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CASES ON
CONTRACTS
AND
COMBINATIONS
IN RESTRAINT OF TRADE

SELECTED FROM THE DECISIONS OF
ENGLISH AND AMERICAN COURTS

By ALBERT M. KALES

Professor of Law in Harvard University

IN TWO VOLUMES
VOLUME II

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CASES ON

**CONTRACTS IN RESTRAINT OF TRADE AND
ILLEGAL COMBINATIONS**

STATE v. STANDARD OIL CO.

(Supreme Court of Ohio, 1892. 49 Oh. St. 137.)

Application by the state of Ohio ex rel. David K. Watson, the attorney general, for a writ of quo warranto against the Standard Oil Company.

The other facts fully appear in the following statement by MINSHALL, J.:

The state, by its attorney general, commenced this action to oust the defendant of the right to be a corporation, on the ground that it has abused its corporate franchises, by becoming a party to an agreement that is against public policy. The questions are presented by the pleadings,—the amended petition, the answer thereto, and the demurrer of the state to the answer,—and are as follows:

“AMENDED PETITION.

“Now comes David K. Watson, the duly elected, qualified, and acting attorney general of the state of Ohio, and gives the court to understand and be informed that on or about the 10th day of January, A. D. 1870, the defendant, the Standard Oil Company, was formed and organized as a corporation under and according to the laws of the state of Ohio. That the only purpose of said defendant, as set forth in its articles of incorporation, is ‘the manufacture of petroleum and to deal in petroleum and its products.’ That at the time of the defendant’s incorporation its capital stock was fixed at \$1,000,000. That subsequently, to-wit, on or about the 12th day of February, A. D. 1872, the defendant’s capital stock was increased to the

sum of \$2,500,000. That afterwards, to-wit, on or about the 13th day of March, A. D. 1875, said capital stock was increased to the sum of \$3,500,000; and that, after its organization, as aforesaid, said defendant entered upon and continued generally in the pursuit of its corporate objects, with its principal place of business in the city of Cleveland, in this state, until on or about the date of the trust agreements hereinafter complained of and set forth.

Plaintiff further avers that, in violation of law and in abuse of its corporate powers, and in the exercise of privileges, rights, and franchise not conferred upon it, defendant, on or about the 2d day of January, A. D. 1882, and again on or about the 4th day of said month and year, entered into and became a party to certain trust agreements, and ever since then has, in the manner and to the extent below stated, observed, performed, and carried out said agreements, copies of which are hereinafter set out. That said defendant so entered into and became a party to and carried out and observed and performed the same as follows, to-wit: All of the owners and holders of its capital stock, including all the officers and directors of said defendant company, signed said agreements, without attaching the corporate name and seal of said defendant company thereto, and the official designations of its officers. That, prior to the dates of the trust agreements aforesaid, defendant's capital stock consisted of 35,000 shares of \$100 each, and upon the signing of said agreements in the manner aforesaid 34,993 shares of said stock, belonging to the persons who signed the agreements in manner above set forth (in what proportions, however, plaintiff is unable to state), were transferred, by defendant's transferring officers, upon defendant's stock-books, to the certain nine trustees who were appointed and named in the first one of said trust agreements, upon the request of the respective owners of said shares and in pursuance of the provisions of said trust agreements; the remaining seven of said shares of stock being retained by or transferred to the directors of defendant company. That, at the time said transfer of stock was made, there were seven directors of defendant company, and each one of the seven held one share of the stock aforesaid; but the number of said directors was thereafter reduced to five, who still hold and vote said seven shares of

stock and no more. That in lieu of the transfer of said 34,993 shares, as aforesaid, to the nine trustees above mentioned, an equal amount in par value of certificates of the Standard Oil Trust, which were provided for and described in said trust agreements, were issued and delivered by said nine trustees to the persons aforesaid, from whom said nine trustees had received said 34,993 shares of stock in defendant company. That the capital stock of said defendant company is still \$3,500,000, and the nine trustees before mentioned still hold and control the 34,993 shares thereof which were transferred to them as above stated. That by virtue of so holding and controlling said shares said nine trustees have been ever since the signing of said agreements, and still are, able to choose and have chosen, annually, such boards of directors of defendant company as they (said nine trustees) have seen fit, and are able to, and do, control the action of the defendant in the conduct and management of its business. That some of the directors of defendant company, including its president, have been, since the date of said agreements, and still are, members of the board of nine trustees provided for in said trust agreements as aforesaid; the president of defendant company having been, and being now, the president of said board of nine trustees. That defendant has never taken any corporate action, or made any complaint against its said stockholders or its directors and officers signing said trust agreements, or either of them, nor against its said stockholders or officers surrendering their stock in the defendant company to said nine trustees, nor against its stockholders or officers or directors receiving the Standard Oil Trust certificates which were issued and delivered to them as aforesaid by said nine trustees in exchange for the 34,993 shares of defendant's stock, nor against any of the acts herein recited; and that none of the officers, directors, or stockholders of defendant company have at any time objected or made complaint against such surrender and exchange of stock or against any of said recited acts, and, on the contrary, defendant, in its corporate capacity, and through its officers and stockholders, has ever since the acts in question acquiesced in such transfer and exchange, and in the annual election by said nine trustees of the directors for defendant, as well as in all said recited acts. That the directors of defendant company

who are chosen in manner aforesaid, either directly or through their employes, manage the business of that company so as not to conflict with the policy fixed from time to time by the nine trustees aforesaid. That the net earnings of defendant company have been, ever since the signing of said agreements, and still are from time to time, declared and paid out as dividends upon its capital stock. That the nine trustees appointed under said trust agreements as aforesaid have received the proportions of such dividends which were properly distributable and payable upon the stock held by said nine trustees in defendant company. That there are a large number of other corporations (plaintiff being unable to ascertain or state the exact number) in the United States, whose organizations were made, stock is held, and directors elected, and whose affairs and business and dividends are conducted and paid under and pursuant to the provisions of the trust agreements hereinafter set forth, in a manner and to an extent similar to that herein described in respect to defendant, and from the dividends so accumulated in the hands of said nine trustees dividends are, from time to time, as the interests of the trust justify, declared and paid out by said nine trustees to the holders of the Standard Oil Trust certificates which have been issued by them; so that the holders of the 34,993 shares of said Standard Oil Trust certificates which were received in lieu of a like number of shares of defendant's stock, transferred in manner aforesaid upon the books of defendant company to said nine trustees, do not receive the dividends which are payable from the earnings of defendant company, but receive dividends only from the accumulated earnings aforesaid, which are derived from the various similar companies aforesaid, and held and distributed as aforesaid by said nine trustees.

"The following are correct copies of the two trust agreements hereinbefore mentioned and referred to:

" "This agreement, made and entered upon this second day of January, A. D. 1882, by and between all the persons who shall now or may hereafter execute the same as parties thereto, witnesseth:

" '1. It is intended that the parties to this agreement shall embrace three classes, to-wit:

" "(1) All the stockholders and members of the following

corporations and limited partnerships, to-wit: Aeme Oil Company, (New York); Aeme Oil Company, (Pennsylvania); Atlantic Refining Company of Philadelphia; Bush & Co., Limited; Camden Consolidated Oil Company; Elizabethport Acid Works; Imperial Refining Company, Limited; Chas. Pratt & Co.; Paine, Ablett & Co., Limited; Standard Oil Company, (Ohio); Standard Oil Company, (Pittsburgh); Smith's Ferry Oil Trans. Company; Solar Oil Company, Limited; Sone & Fleming Manufacturing Company, Limited. Also all the stockholders and members of such other corporations and limited partnerships as may hereafter join in this agreement at the request of the trustees herein provided for.

“(2) The following individuals, to-wit: W. C. Andrews; Jno. D. Archbold; Lide K. Arter; J. A. Bostwick; Benj. Brewster; D. Bushnell; Thos. C. Bushnell; J. N. Camden; Henry L. Davis; H. M. Flagler; Mrs. H. M. Flagler; H. M. Harma; Geo. W. Chapin; D. M. Harkness; D. H. Harkness, trustee; S. V. Harkness; John Huntington; H. A. Hutchins; Chas. F. G. Heye; O. B. Jennings; Chas. Lockhart; A. M. McGregor; Wm. H. Macy; Wm. H. Macy, Jr.; estate of Josiah Macy, Jr.; Wm. H. Macy, Jr., executor; O. H. Payne; O. H. Payne, trustee; Chas. Pratt; Horace A. Pratt; C. M. Pratt; A. J. Pouch; John D. Rockefeller; Wm. Rockefeller; Henry H. Rogers; W. P. Thompson; J. J. Vandegrift; William T. Wardwell; W. G. Warden; Jos. L. Warden; Warden, Frew & Co.; Louise C. Wheaton; Julia H. York; Geo. H. Vilas; M. R. Keith; Geo. F. Chester, trustees. Also all such individuals as may hereafter join in this agreement at the request of the trustees herein provided for.

“(3) A portion of the stockholders and members of the following corporations and limited partnerships, to-wit: American Lubricating Oil Co.; Baltimore United Oil Co.; Beacon Oil Co.; Bush & Denslow Manufacturing Co.; Central Refining Co. of Pittsburgh; Chesebrough Manufacturing Co.; Chess Carley Co.; Consolidated Tank Line Co.; Inland Oil Co.; Keystone Refining Co.; Maverick Oil Co.; National Transit Co.; Portland Kerosene Oil Co.; Producers' Consolidated Land and Petroleum Co.; Signal Oil-Works, Limited; Thompson & Bedford Co., Limited; Devoe Manufacturing Co.; Eclipse Lubricating Oil Co., Limited; Empire Refining Co., Limited; Franklin

Pipe Co., Limited; Galena Oil-Works, Limited; Galena Farm Oil Co., Limited; Germania Mining Co.; Vacuum Oil Co.; H. C. Van Tine & Co., Limited; Waters-Pierce Oil Co. Also stockholders and members (not being all thereof) of other corporations and limited partnerships who may hereafter join in this agreement at the request of the trustees herein provided for.

“ ‘II. The parties hereto do covenant and agree to and with each other, each in consideration of the mutual covenants and agreements of the others, as follows:

“ ‘(1) As soon as practicable, a corporation shall be formed in each of the following states, under the laws thereof, to-wit: Ohio, New York, Pennsylvania, and New Jersey; provided, however, that instead of organizing a new corporation, any existing charter and organization may be used for the purpose when it can advantageously be done.

“ ‘(2) The purposes and powers of said corporation shall be to mine for, produce, manufacture, refine, and deal in petroleum, and all its products, and all the materials used in such businesses; and transact other business collateral thereto. But other purposes and powers shall be embraced in the several charters, such as shall seem expedient to the parties procuring the charter; or, if necessary to comply with the law, the powers aforesaid may be restricted and reduced.

“ ‘(3) At any time hereafter, when it may seem advisable to the trustees herein provided for, similar corporations may be formed in other states and territories.

“ ‘(4) Each of said corporations shall be known as the “Standard Oil Company of —,” (and here shall follow the name of the state or territory by virtue of the laws of which said corporation is organized).

“ ‘(5) The capital stock of each of said corporations shall be fixed at such an amount as may seem necessary and advisable to the parties organizing the same, in view of the purpose to be accomplished.

“ ‘(6) The shares of stock of each of said corporations shall be issued only for money, property, or assets, equal, at a fair valuation, to the par value of the stock delivered therefor.

“ ‘(7) All of the property, real and personal, assets, and business, of each and all of the corporations and limited partnerships mentioned or embraced in class first shall be trans-

ferred to and vested in the said several Standard Oil Companies. All of the property, assets, and business in or of each particular state shall be transferred to and vested in the Standard Oil Company of that particular state; and in order to accomplish such purpose, the directors and managers of each and all of the several corporations and limited partnerships mentioned in class first are hereby authorized and directed by the stockholders and members thereof (all of them being parties to this agreement) to sell, assign, transfer, convey, and make over, for the consideration hereinafter mentioned, to the Standard Oil Company or companies of the proper state or states, as soon as said corporations are organized and ready to receive the same, all the property, real and personal, assets, and business, of said corporations, and limited partnerships. Correct schedules of such property, assets, and business shall accompany each transfer.

“(8) The individuals embraced in class second of this agreement do each for himself agree, for the consideration hereinafter mentioned, to sell, assign, transfer, convey, and set over all the property, real and personal, assets, and business, mentioned and embraced in schedules accompanying such sale and transfers to the Standard Oil Company or companies of the proper state or states, as soon as the said corporations are organized and ready to receive the same.

“(9) The parties embraced in class third of this agreement do covenant and agree to assign and transfer all of the stock held by them in the corporations or limited partnerships herein named to the trustees herein provided for, for the consideration and upon the terms hereinafter set forth. It is understood and agreed that the said trustees and their successors may hereafter take the assignment of stocks in the same or similar companies upon the terms herein provided, and that whenever and as often as all the stocks of any corporation or limited partnership are vested in said trustees, the proper steps may then be taken to have all the money, property, real and personal, of such corporation or partnership assigned and conveyed to the Standard Oil Company of the proper state, on the terms and in the mode herein set forth, in which event the trustees shall receive stocks of the Standard Oil Companies equal to the value of the money, property, and business assigned, to be held in

place of the stocks of the company or companies assigning such property.

“(10) The consideration for the transfer and conveyance of the money, property, and business aforesaid to each or any of the Standard Oil Companies shall be stock of the respective Standard Oil Company to which said transfer or conveyance is made, equal at par value to the appraised value of the money, property, and business so transferred. Said stock shall be delivered to the trustees hereinafter provided for, and their successors; and no stock of any of said companies shall ever be issued except for money, property, or business equal at least to the par value of the stock so issued; nor shall any stock be issued by any of said companies for any purposes, except to the trustees herein provided for, to be held subject to the trusts hereinafter specified. It is understood, however, that this provision is not intended to restrict the purchase, sale, and exchange of property by said Standard Oil Companies as fully as they may be authorized to do by their respective charters, provided only that no stock be issued therefor except to said trustees.

“(11) The consideration for any stocks delivered to said trustees as above provided for, as well as for stocks delivered to said trustees by persons mentioned or included in class third of this agreement, shall be the delivery by said trustees to the persons entitled thereto of trust certificates hereinafter provided for, equal at par value to the par value of the stocks of the said Standard Oil Companies so received by said trustees, and equal to the appraised value of the stocks of other companies or partnerships delivered to said trustees. (The said appraised value shall be determined in a manner agreed upon by the parties in interest and the said trustees.) It is understood and agreed, however, that the said trustees may, with any trust funds in their hands, in addition to the mode above provided, purchase the bonds and stocks of other companies engaged in business similar or collateral to the business of said Standard Oil Companies, on such terms and in such mode as they may deem advisable, and shall hold the same for the benefit of the owners of said trust certificates, and may sell, assign, transfer, and pledge such bonds and stocks whenever they may deem it advantageous to said trust so to do.

“ III. The trusts upon which said stocks shall be held, and the number, powers, and duties of said trustees, shall be as follows:

“ “ (1) The number of trustees shall be nine.

“ “ (2) J. D. Rockefeller, O. H. Payne, and Wm. Rockefeller are hereby appointed trustees, to hold their office until the first Wednesday of April, A. D. 1885.

“ “ (3) J. A. Bostwick, H. M. Flagler, and W. G. Warden are hereby appointed trustees, to hold their office until the first Wednesday of April, A. D. 1884.

“ “ (4) Chas. Pratt, Benj. Brewster, and Jno. D. Archbold are hereby appointed trustees, to hold their office until the first Wednesday of April, A. D. 1883.

“ “ (5) Elections for trustees to succeed those herein appointed shall be held annually, at which election a sufficient number of trustees shall be elected to fill all vacancies occurring either from expiration of the term of the office of trustee or from any other cause. All trustees shall be elected to hold their office for three years, except those elected to fill a vacancy arising from any cause except expiration of term, who shall be elected for the balance of the term of the trustee whose place they are elected to fill. Every trustee shall hold his office until his successor is elected.

“ “ (6) Trustees shall be elected by ballot by the owners of trust certificates or their proxies. At all meetings the owners of trust certificates, who may be registered as such on the books of the trustees, may vote in person or by proxy, and shall have one vote for each and every share of trust certificates standing in their names, but no such owner shall be entitled to vote upon any share which has not stood in his name thirty days prior to the day appointed for the election. The transfer books may be closed for thirty days immediately preceding the annual election. A majority of the shares represented at such election shall elect.

“ “ (7) The annual meeting of the owners of said trust certificates for the election of trustees and for other business shall be held at the office of the trustees in the city of New York, on the first Wednesday of April of each year, unless the place of meeting be changed by the trustees; and said meeting may be adjourned from day to day until its business

is completed. Special meetings of the owners of said trust certificates may be called by the majority of the trustees at such times and places as they may appoint. It shall also be the duty of the trustees to call a special meeting of holders of trust certificates whenever requested to do so by a petition signed by the holders of ten per cent. in value of such certificates. The business of such special meetings shall be confined to the object specified in the notice given therefor. Notice of the time and place of all meetings of the owners of trust certificates shall be given, by personal notice as far as possible, and by public notice in one of the principal newspapers of each state in which a Standard Oil Company exists, at least ten days before such meeting. At any meeting, a majority in value of the holders of trust certificates represented consenting thereto, by-laws may be made, amended, and repealed, relative to the mode of election of trustees and other business of the holders of trust certificates: provided, however, that said by-laws shall be in conformity with this agreement. By-laws may also be made, amended, and repealed at any meeting, by and with the consent of a majority in value of the holders of trust certificates, which alter this agreement relative to the number, powers, and duties of the trustees, and to other matters tending to the more efficient accomplishment of the objects for which the trust is created: provided only, that the essential intents and purposes of this agreement be not thereby changed.

“(8) Whenever a vacancy occurs in the board of trustees more than sixty days prior to the annual meeting for the election of trustees, it shall be the duty of the remaining trustees to call a meeting of the owners of Standard Oil Trust certificates for the purpose of electing a trustee or trustees to fill the vacancy or vacancies. If any vacancy occurs in the board of trustees from any cause within sixty days of the date of the annual meeting for the election of trustees, the vacancy may be filled by a majority of the remaining trustees, or, at their option, may remain vacant until the annual election.

“(9) If, for any reason, at any time, a trustee or trustees shall be appointed by any court to fill any vacancy or vacancies in said board of trustees, the trustee or trustees so appointed shall hold his or their respective office or offices only

until a successor or successors shall be elected in the manner above provided for.

“(10) Whenever any change shall occur in the board of trustees, the legal title to the stock and other property held in trust shall pass to and vest in the successors of said trustees without any formal transfer thereof. But if at any time such formal transfer shall be deemed necessary or advisable, it shall be the duty of the board of trustees to obtain the same, and it shall be the duty of any retiring trustee, or the administrator or executor of any deceased trustee, to make said transfer.

“(11) The trustees shall prepare certificates, which shall show the interest of each beneficiary in said trust, and deliver them to the persons properly entitled thereto. They shall be divided into shares of the par value of one hundred dollars each, and shall be known as “Standard Oil Trust Certificates,” and shall be issued subject to all the terms and conditions of this agreement. The trustees shall have power to agree upon and direct the form and contents of said certificates, and the mode in which they shall be signed, attested, and transferred. The certificates shall contain an express stipulation that the holders thereof shall be bound by the terms of this agreement and by the by-laws herein provided for.

“(12) No certificates shall be issued except for stocks and bonds held in trust, as herein provided for; and the par value of certificates issued by said trustees shall be equal to the par value of the stocks of said Standard Oil Companies, and the appraised value of other bonds and stocks held in trust. The various bonds, stocks, and moneys held under said trust shall be held for all parties in interest jointly, and the trust certificates so issued shall be the evidence of the interest held by the several parties in this trust. No duplicate certificates shall be issued by the trustees, except upon surrender of the original certificate or certificates for cancellation, or upon satisfactory proof of the loss thereof; and in the latter case they shall require a sufficient bond of indemnity.

“(13) The stocks of the various Standard Oil Companies held in trust by said trustees shall not be sold, assigned, or transferred by said trustees, or by the beneficiaries, or by both combined, so long as this trust endures. The stocks and

bonds of other corporations, held by said trustees, may be by them exchanged or sold, and the proceeds thereof distributed *pro rata* to the holders of trust certificates, or said proceeds may be held and reinvested by said trustees for the purposes and uses of the trust: provided, however, that said trustees may, from time to time, assign such shares of stock of said Standard Oil Companies as may be necessary to qualify any person or persons chosen or to be chosen as directors and officers of any of said Standard Oil Companies.

“(14) It shall be the duty of said trustees to receive and safely to keep all interest and dividends declared and paid upon any of the said bonds, stocks, and moneys held by them in trust, and to distribute all moneys received from such sources or from sales of trust property or otherwise, by declaring and paying dividends upon the Standard Trust certificates as funds accumulate, which, in their judgment, are not needed for the uses and expenses of said trust. The trustees shall, however, keep separate accounts of receipts from interest and dividends, and of receipts from sales or transfers, of trust property; and, in making any distribution of trust funds, in which moneys derived from sales or transfers shall be included, shall render the holders of trust certificates a statement showing what amount of the fund distributed has been derived from such sales or transfers. The said trustees may be also authorized and empowered by a vote of a majority in value of holders of trust certificates, whenever stocks or bonds have accumulated in their hands from money purchases thereof, or the stocks or bonds held by them have increased in value, or stock dividends shall have been declared by any of the companies whose stocks are held by said trustees, or whenever, from any such cause, it is deemed advisable so to do, to increase the amount of trust certificates to the extent of such increase or accumulation of values, and to divide the same among the persons then owning trust certificates *pro rata*.

“(15) It shall be the duty of said trustees to exercise general supervision over the affairs of said several Standard Oil Companies, and, as far as practicable, over the other companies or partnerships, any portion of whose stock is held in said trust. It shall be their duty, as stockholders of said companies, to elect as directors and officers thereof faithful

and competent men. They may elect themselves to such positions when they see fit so to do, and shall endeavor to have the affairs of said companies managed and directed in the manner they may deem most conducive to the best interests of the holders of said trust certificates.

“(16) All the powers of the trustees may be exercised by a majority of their number. They may appoint from their own number an executive and other committees. A majority of each committee shall exercise all the powers which the trustees may confer upon such committee.

“(17) The trustees may employ and pay all such agents and attorneys as they deem necessary in the management of said trust.

“(18) Each trustee shall be entitled to a salary for his services not exceeding twenty-five thousand dollars per annum, except the president of the board, who may be voted a salary not exceeding thirty thousand dollars per annum, which salaries shall be fixed by said board of trustees. All salaries and expenses connected with or growing out of the trust shall be paid by the trustees from the trust fund.

“(19) The board of trustees shall have its principal office in the city of New York, unless changed by vote of the trustees, at which office, or in some place of safe deposit in said city, the bonds and stocks shall be kept. The trustees shall have power to adopt rules and regulations pertaining to the meetings of the board, the election of officers, and the management of the trust.

“(20) The trustees shall render at each annual meeting a statement of the affairs of the trust. If a termination of the trust be agreed upon as hereinafter provided, or within a reasonable time prior to its termination by lapse of time, the trustees shall furnish to the holders of the trust certificates a true and perfect inventory and appraisalment of all stocks and other property held in trust, and a statement of the financial affairs of the various companies whose stocks are held in trust.

“(21) This trust shall continue during the lives of the survivors and survivor of the trustees in this agreement named, and for twenty-one years thereafter: provided, however, that if at any time after the expiration of ten years two-thirds of

all the holders in value, or if after the expiration of one year ninety per cent. of all the holders in value, of trust certificates shall, at a meeting of holders of trust certificates called for that purpose, vote to terminate this trust at some time to be by them then and there fixed, the said trust shall terminate at the date so fixed. If the holders of trust certificates shall vote to terminate the trust as aforesaid, they may, at the same meeting, or at a subsequent meeting called for that purpose, decide by a vote of two-thirds in value of their number the mode in which the affairs of the trust shall be wound up, and whether the trust property shall be distributed; or whether it shall be sold, and the values thereof distributed; or whether part, and, if so, what part, shall be divided and what part shall be sold; and whether such sales shall be public or private. The trustees, who shall continue to hold their offices for that purpose, shall make the distribution in the mode directed, or, if no mode be agreed upon by two-thirds in value as aforesaid, the trustees shall make distribution of the trust property according to law. But said distribution, however made, and whether it be of property or values or of both, shall be just and equitable, and such as to insure to each owner of a trust certificate his due proportion of the trust property or the value thereof.

“(22) If the trust shall be terminated by expiration of the time for which it is created, the distribution of the trust property shall be directed and made in the mode above provided.

“(23) This agreement, together with the registry of certificates, books of accounts, and other books and papers connected with the business of said trust, shall be safely kept at the principal office of said trustees.”

“(Signatures omitted.)

“The plaintiff further avers that after the execution and delivery of the trust agreement aforesaid, to-wit, on the 4th day of January, A. D. 1882, in violation of law, and in abuse of its powers, and in the exercise of privileges and franchises not conferred upon it, the defendant, acting through the same parties as before alleged in respect of the above-recited agreement, together with the subscribers thereto, who were the same

as those whose names were subscribed to the other agreement aforesaid, entered into and became a party to, carried out, and still continues to observe, perform, and carry out, a supplemental trust agreement, which, if not in words and figures, is in substance and effect, as follows:

“ ‘Whereas, in and by an agreement dated January 2, 1882, and known as the “Standard Trust Agreement,” the parties thereto did mutually covenant and agree, *inter alia*, as follows, to-wit: That corporations to be known as “Standard Oil Companies” of various states should be formed, and that all of the property, real and personal, assets, and business of each and all of the corporations and limited partnerships mentioned or embraced in class first of said agreement should be transferred to and vested in the said several Standard Oil Companies; that all of the property, assets, and business in or of each particular state should be transferred to and vested in the Standard Oil Company of that particular state, and the directors and managers of each and all of the several corporations and associations mentioned in class first were authorized and directed to sell, assign, transfer, and convey and make over to the Standard Oil Company or companies of the proper state or states, as soon as said corporations were organized and ready to receive the same, all the property, real and personal, assets, and business of said corporations or associations; and whereas, it is not deemed expedient that all of the companies and associations mentioned should transfer their property to the said Standard Oil Companies at the present time, and in case of some companies and associations it may never be deemed expedient that the said transfer should be made, and said companies and associations go out of existence; and whereas, it is deemed advisable that a discretionary power should be vested in the trustees as to when such transfer or transfers should take place, if at all: Now, it is hereby mutually agreed between the parties to the said trust agreement, and as supplementary thereto, that the trustees named in the said agreement and their successors shall have the power and authority to decide what companies shall convey their said property as in said agreement contemplated, and when the said sales and transfers shall take place, if at all; and until said trustees shall so decide each of said companies

shall remain in existence and retain its property and business, and the trustees shall hold the stocks thereof in trust, as in said agreement provided. In the exercise of said discretion, the trustees shall act by a majority of their number, as provided in said trust agreement. All portions of said trust agreement relating to this subject shall be considered so changed as to be in harmony with this supplemental agreement. In witness whereof, the said parties have subscribed this agreement this 4th day of January, 1882.'

“(Signatures omitted.)

“Plaintiff further avers that the nine persons who were appointed and named as trustees in and under the provisions of said trust agreements accepted their several positions and entered upon the discharge of the trust duties therein mentioned; that some of said trustees and others to the number of nine, whose names are unknown to plaintiff, have been reappointed and appointed at various times since the execution of said trust agreements, so that nine trustees have been ever since then, and still are, acting thereunder, and each and all of said trustees have been and are non-residents of the state of Ohio; that the offices and principal place of business of said trustees have been, ever since the execution of said trust agreements, and still are, in the city of New York, and the elections of said trustees and business transacted by them at their meetings have been had and done in said city of New York; and that plaintiff had no knowledge of the existence of either of the aforesaid trust agreements, or of the acts hereinbefore recited, until the latter part of the year 1889.

“Plaintiff further avers that, by reason of defendant's stockholders, directors, and officers signing and entering into said trust agreements and carrying out their provisions and surrendering their stock in defendant and accepting in lieu thereof certificates issued by the nine trustees aforesaid, and permitting the corporate powers, business, and property of the defendant to be exercised, conducted, and controlled by said trustees in manner aforesaid, and by reason of the acts and omissions of defendant hereinbefore recited, said defendant has forfeited its corporate rights, privileges, powers, and franchises.

"Wherefore, plaintiff prays that defendant be found and adjudged to have forfeited and surrendered its corporate rights, privileges, powers, and franchises, and that it be ousted and excluded therefrom, and that it be dissolved, and that such other relief be granted in the premises as to the court may seem just and proper.

"DAVID K. WATSON,
"Attorney General."

"ANSWER TO AMENDED PETITION

"Now comes the defendant, and, answering the amended petition filed herein, admits—(1) That David K. Watson is the duly elected, qualified, and acting attorney general of the state of Ohio. (2) Admits that defendant was formed and organized as a corporation under and according to the laws of the state of Ohio, on or about the time alleged, and for the purposes stated. (3) That the capital stock of the company was originally fixed at one million of dollars, and afterwards increased at the times and in the sums alleged. (4) It admits that after its organization it entered upon and continued generally in the pursuit of its corporate objects with its principal place of business in the city of Cleveland, Ohio, but it avers that it did this not only up to the date of the so-called 'Trust Agreements,' but that it has ever maintained such corporate organization, and has ever pursued, and still does pursue, in accordance with law, the objects and purposes for which it was incorporated, with its principal place of business at the city of Cleveland. (5) Defendant admits that at one time its board was composed of seven directors, and that the number was afterwards reduced to five. It admits that its president is also president of a board of trustees, whose office and principal place of business is now in the city of New York, and it admits that it has always, when certificates of its stock have been presented to it with transfers duly indorsed thereon in accordance with its by-laws, issued new certificates of stock to the transferees thereof, as it was its duty to do; and it denies that it has legal power to do otherwise. Defendant denies that it did on or about the 2d day of January, A. D. 1882, or again on about the 4th day of said month and year, or at any other time, enter into or become a party to either or

both of the agreements in said petition set forth, and it denies that it has at any time or in any manner acquiesced in, observed, performed, or carried out either or both of said agreements. Defendant denies that it entered into or became a party to, or carried out, observed, or performed, the said agreements in the manner alleged in said petition, or that it became a party to or carried out, observed, or performed the said agreements, or either of them, in any form or manner whatsoever. Defendant admits that prior to the dates of said agreements defendant's capital stock consisted of 35,000 shares of one hundred dollars each, and it avers that the amount of its capital stock and shares remain unchanged. And it alleges that its corporate powers, business, and property are exercised, conducted, and controlled solely by its board of directors, a majority of whom are citizens of the state of Ohio, annually elected by its stockholders; and that dividends of its profits are regularly declared by its board of directors, and paid to the holders of its stock appearing as such on its stock books. That it has always, and still does, maintain its independent corporate action, and ever has, and still does, manage its business through its board of directors, in accordance with its charter, without injury to the public, but with benefit thereto, by increasing the variety and quantity of the products of petroleum, improving their quality, and greatly cheapening their price to the consuming public.

“Defendant, further answering, says that it is informed and believes that on or about the dates alleged in said petition, to-wit, the 2d and 4th of January, 1882, the individuals named in said agreement, being the same individuals who executed said agreement, and being then both in common and severally owners of all or of the greater part of the stocks of each of the corporations and limited partnerships mentioned in said agreements, and owning other interest in the oil business in partnership, said corporations having been either organized by said individuals for the purpose of carrying on the oil business in its different branches in different localities and states, or the stocks thereof having been obtained by purchase with a like intent, did enter into the agreements set forth, and to facilitate the purposes therein set forth of covering the said partnership interests into corporate interests, and of so read-

justing and consolidating the aforesaid corporate interests in the modes provided by the laws of the various states which require the assent of stockholders thereto as to have the business in each state, so far as legally possible, conducted by one corporation in each state in which the business was located, did assign their stocks to trustees, the individuals named as trustees being prior to and at the date of said agreement absolute owners and holders of a large majority of said stocks in said companies and in defendant company; and as such absolute owners and holders the said individuals long prior to the said agreement had the voting power and elected the directors of defendant company, and exercised such control of defendant company as a majority of stockholders legally may exercise; and avers that by virtue of said agreements and anything done thereunder said voting power and control was not and has not been in any manner altered, nor was it nor has it been vested in persons not entitled thereto by virtue of absolute ownership of stocks in defendant company. And defendant alleges that said agreements were agreements of individuals in their individual capacity and with reference to their individual property, and were not, nor were they designed to be, corporate agreements; and defendant denies that said agreements have illegally affected it in its corporate capacity, or that defendant has permitted its corporate powers, business, and property to be exercised, conducted, and controlled in an illegal manner. Defendant says by way of further answer and defense that if said action by said stockholders, in becoming parties to the several agreements alleged in the petition in their individual capacity and with reference to their individual property, shall be deemed and held by this court to have been the corporate act of defendant, and if the signing by the said stockholders of the said several agreements as aforesaid shall be deemed and held by this court to be a cause for forfeiture of the charter of this defendant, then this defendant says that such act was done and committed more than five years before the filing of the petition herein, and that the cause of action is therefore barred. Wherefore defendant prays to be hence dismissed, with judgment for its costs.

“STANDARD OIL Co.

“By M. R. KEITH and VIRGIL P. KLINE,

“Its Attorneys.”

The state, by its attorney general, demurred, on the ground that the answer states no defense to the action.

MINSHALL, J. (after stating the facts). Three questions arise upon the pleadings: (1) Should the defendant, the Standard Oil Company, be regarded as a party in its corporate capacity to the agreement constituting the Standard Oil Trust? (2) Had the company power to become a party to such an agreement? (3) If so, is the right of the state to demand a forfeiture of its corporate franchises, or of the power to make and perform such agreements, barred by lapse of time?

1. It will be observed on reading the answer that while the defendant denies that it "entered into or became a party to either or both of the agreements in said petition set forth," and also "denies that it has at any time or in any manner acquiesced in or observed, performed, or carried out either or both of said agreements," it does not deny the averment of the petition that "all of the owners and holders of its capital stock, including all the officers and directors of said company, signed said agreements." Nor could it have been the intention to do so, as the answer proceeds to admit "that it [the corporation] is informed and believes that the individuals named in the agreement, being the same individuals who executed" it, "did enter into the agreements set forth" in the petition; claiming "that said agreements were agreements of individuals in their individual capacity and with reference to their individual property, and were not, nor were they designed to be, corporate agreements." The claim is based upon the argument that the corporation is a legal entity, separate from its stockholders; that in it is vested all the property and powers of the company, and can only be affected by such acts and agreements as are done or executed on its behalf by its corporate agencies, acting within the legitimate scope of their powers; that its stockholders are not the corporation; that their shares are their individual property, and that they may each and all dispose of and make such agreements affecting their shares as best suit their private interests; and that no such acts and agreements of stockholders, subservient of their private interests, can be ascribed to the company as a separate

entity, though done and concurred in by each and all of its stockholders.

The general proposition that a corporation is to be regarded as a legal entity, existing separate and apart from the natural persons composing it, is not disputed; but that the statement is a mere fiction, existing only in idea, is well understood, and not controverted by any one who pretends to accurate knowledge on the subject. It has been introduced for the convenience of the company in making contracts, in acquiring property for corporate purposes, in suing and being sued, and to preserve the limited liability of the stockholders by distinguishing between the corporate debts and property of the company and of the stockholders in their capacity as individuals. All fictions of law have been introduced for the purpose of convenience, and to subserve the ends of justice. It is in this sense that the maxim *in fictione juris subsistit aequitas* is used, and the doctrine of fictions applied. But when they are urged to an intent and purpose not within the reason and policy of the fiction, they have always been disregarded by the courts. Broom, Leg. Max. 130. "It is a certain rule," says Lord MANSFIELD, C. J., "that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted." Johnson v. Smith, 2 Burrows, 962.

No reason is perceived why the principles applicable to fictions in general should not apply to the fiction "that a corporation is a personal entity, separate from the natural persons who compose it, and for whose benefit it has been invented." One author seems to think that it has out-lived its usefulness; that it is "a stumbling-block in the advance of corporation law towards the discrimination of the real rights of men and women," and should be abandoned. Tayl. Corp. § 51. Among the many attempts that have been made to define the nature of a corporation, that given by Mr. Kyd, discarding, or at least not adopting, the metaphysical distinction of a legal entity separate from the persons comprising it, is certainly the most practical, presenting, as it does, the real nature of a corporation as seen in its constituents, and in the manner that it is formed and transacts its business. His definition is: "A collection of many individuals united into one body, under

a special denomination, having perpetual succession under an artificial form, and vested by the policy of the law with the capacity of acting in several respects as an individual, particularly of taking and granting property, of contracting obligations, and of suing and being sued, of enjoying privileges and immunities in common, and of exercising a variety of political rights more or less extensive according to the design of its institution or the powers conferred upon it, either at the time of its creation or any subsequent period of its existence." 1 Kyd, Corp. 13. In brief, then, a corporation is a collection of many individuals, united in one body under a special denomination, and vested by the policy of the law with the capacity of acting in several respects as an individual. "The statement," says Mr. Morawetz, "that a corporation is an artificial person or entity, apart from its members, is merely a description, in figurative language, of a corporation viewed as a collective body. A corporation is really an association of persons, and no judicial *dictum* or legislative enactment can alter this fact." See his work on Corporations, § 227. So that the idea that a corporation may be a separate entity, in the sense that it can act independently of the natural persons composing it, or abstain from acting, where it is their will that it shall, has no foundation in reason or authority, is contrary to the fact, and to base an argument upon it, when the question is as to whether a certain act was the act of the corporation or of its stockholders, cannot be decisive of the question, and is therefore illogical; for it may as likely lead to a false as to a true result.

Now, so long as a proper use is made of the fiction that a corporation is an entity apart from its shareholders, it is harmless, and, because convenient, should not be called in question; but where it is urged to an end subversive of its policy, or such is the issue, the fiction must be ignored, and the question determined whether the act in question, though done by shareholders,—that is to say, by the persons uniting in one body,—was done simply as individuals, and with respect to their individual interests as shareholders, or was done ostensibly as such, but, as a matter of fact, to control the corporation, and affect the transaction of its business, in the same manner as if the act had been clothed with all the

formalities of a corporate act. This must be so, because, the stockholders having a dual capacity, and capable of acting in either, and a possible interest to conceal their character when acting in their corporate capacity, the absence of the formal evidence of the character of the act cannot preclude judicial inquiry on the subject. If it were otherwise, then in one department of the law fraud would enjoy an immunity awarded to it in no other.

Therefore the real question we are now to determine is whether it appears from the face of the pleadings, giving effect to all the denials of fact contained in the answer, that the execution of the agreement set forth in the petition should be imputed to the association of persons constituting the Standard Oil Company of Ohio, acting in their corporate capacity.

The agreement provides, in the first place, that the parties to it shall be divided into three classes, the first class to embrace all the stockholders and members of certain corporations and limited partnerships, the defendant, the Standard Oil Company of Ohio, being one. It is then covenanted by the parties that as soon as practicable a corporation shall be formed in each of certain states, under the laws thereof, (Ohio being one,) to mine for, produce, manufacture, refine, and deal in petroleum and all its products, with the proviso, however, that, instead of organizing a new corporation, any existing one "may be used for the purpose when it can advantageously be done," and in Ohio the defendant has been so used.

In a subsequent part of the agreement nine trustees are selected, their powers and duties are defined, and provision made for the selection of their successors.

As will hereafter appear, it is made the duty of the parties to the agreement to transfer their stocks or interests in their respective companies or firms to these trustees, who hold the same in trust, but with the power to vote on the same as though the real owners; in consideration of which trust certificates are issued to the owners, who, as the owners of such certificates, elect the successors of the trustees.

It is then provided that all the property, assets, and business of the corporations and limited partnerships embraced in the first class "shall be transferred to and vested in the said sev-

eral Standard Oil Companies." And in order to accomplish this purpose it is provided that "the directors and managers of each and all of the several corporations and limited partnerships mentioned in class first are hereby authorized and directed by the stockholders and members thereof (all of them being parties to this agreement) to sell, assign, transfer, convey, and make over, for the consideration hereinafter mentioned, to the Standard Oil Company or companies of the proper state or states, as soon as said corporations are organized and ready to receive the same, all the property, real and personal, assets, and business of said corporations and limited partnerships."

Now, in the case of the defendant it will be observed that this contemplated, and could not have accomplished without, corporate action. The Standard Oil Company of Ohio was required to transfer all its property, assets, and business to a new company, to be organized in the state; and this was to be accomplished by the obligation imposed on its members and stockholders, all of whom are parties to the agreement, to authorize and require the directors and managers to make the transfer. The property and assets of the corporation could only be transferred by a corporate act, and the agreement could not, in this respect, be carried into effect, other than by such corporate act, and clearly indicates that the purpose of the stockholders of the defendant in becoming a party to it was to affect their property and business as a corporation; in other words, was to act in their corporate, and not in their individual, capacity.

The subsequent agreement of January 4, 1882, does not materially change the original agreement in this regard. Reciting that "it is not deemed expedient that all of the companies and associations should transfer their property to the said Standard Oil Companies at the present time," and "that it is deemed advisable that a discretionary power should be vested in the trustees as to when such transfer" should be made, it provides that, "until said trustees should so decide, each of said companies shall remain in existence and retain its property and business; and the trustees shall hold the stock thereof in trust as in said agreement provided." So that, under the agreement as modified, the directors and managers of

the defendant, may be required by its stockholders and members, all of whom are parties to the agreement, to make the transfer of the property and business of the defendant whenever the trustees may, in their discretion, direct. The effectiveness of this provision to secure all intended by it may be better understood by observing that "the directors and managers," "the stockholders and members," and "the trustees" here mentioned are substantially the same persons, occupying these different relations at one and the same time.

It signifies nothing that the transfer here provided for has not, as respects the defendant, been made. It does not change the evidence it affords of the purpose and object of the members of the corporation in becoming parties to the agreement.

Again, the agreement, as performed by the members of the defendant, as effectually places the property and business of the defendant under the control and management of the Standard Oil Trust as if the same had been transferred as provided in the original agreement. It is averred in the petition, and not denied in the answer, "that prior to the dates of the trust agreements aforesaid defendant's capital stock consisted of 35,000 shares of \$100 each, and upon the signing of said agreements in the manner aforesaid 34,993 shares of said stock, belonging to the persons who signed the agreements in manner above set forth, (in what proportions, however, plaintiff is unable to state,) were transferred, by defendant's transferring officers, upon defendant's stock-books, to the certain nine trustees who were appointed and named in the first one of said trust agreements, upon the request of the respective owners of said shares, and in pursuance of the provisions of said trust agreements; the remaining seven of said shares of stock being retained by or transferred to the directors of defendant company. That at the time said transfer of stock was made there were seven directors of defendant, and each one of the seven held one share of the stock aforesaid, but the number of said directors was thereafter reduced to five, who still hold and vote said seven shares of stock, and no more. That in lieu of the transfer of said 34,993 shares, as aforesaid, to the nine trustees above mentioned, an equal amount, in par value, of certificates of the Standard Oil Trust, which were provided for and described in said trust agreements, was

issued and delivered by said nine trustees to the persons aforesaid, from whom said nine trustees had received said 34,993 shares of stock in defendant company. That the capital stock of said defendant company is still \$3,500,000, and the nine trustees before mentioned still hold and control the 34,993 shares thereof which were transferred to them as above stated."

So that all but 7 of the 35,000 shares of the defendant's capital stock has been transferred by the owners, who are parties to the agreement, to the trustees of the Standard Oil Trust, and continue to be held in trust, as appears by the supplemental agreement; the transferrers receiving in lieu thereof trust certificates equal at par value to the par value of the stock received. The control which this gives and was intended to give over the business of the defendant appears from the following provision contained in the trust agreement:

"It shall be the duty of said trustees to exercise general supervision over the affairs of said several Standard Oil Companies, and as far as practicable over the other companies or partnerships any portion of whose stock is held in said trust.

"It shall be their duty, as stockholders of said companies, to elect as directors and officers thereof faithful and competent men. They may elect themselves to such positions when they see fit so to do, and shall endeavor to have the affairs of said companies managed and directed in the manner they may deem most conducive to the best interests of the holders of said trust certificates."

Thus the trustees, as the legal owners of the stock, may not only elect whom they please, but may elect themselves, as directors of the defendant; and not only may manage, but it is their duty to have "the affairs" of the defendant managed and directed in the manner they may deem most conducive to the best interests of the holders of the trust certificates. In other words, it is to be managed in the interests of the Standard Oil Trust, whose principal place of business is in New York city, irrespective of what might be its duties to the people of this state, from which it derives its corporate life; and its real stockholders receive their dividends from the profits of that trust, and not from the earnings of their company; for the holders of the trust certificates received in exchange for their stock trans-

ferred to the trustees remain, in law and in equity, the real owners of the stock so transferred. And the averment in the answer that the dividends of the company are paid to the holders of its stock, "appearing as such on its stock-books," is immaterial, since these persons are not the owners, but the trustees, of the stock. In fact, the averment is simply a part of the evidence that the company, through its directors, recognizes and performs the agreement on its part. The payment of its dividends to the persons appearing as stockholders on its stock-books is what enables the parties to the agreement to realize the primary object of the trust agreement,—the accumulation of the earnings of the various companies, partnerships, and individuals named in the agreement, as a common fund, from which the holders of the trust certificates are to be paid dividends when declared by the trustees, and whereby many separate interests, being united under one management, form a virtual monopoly, through the power acquired, of so controlling the production and price of petroleum and its products as to destroy competition.

Applying, then, the principle that a corporation is simply an association of natural persons, united in one body under a special denomination, and vested by the policy of the law with the capacity of acting in several respects as an individual, and disregarding the mere fiction of a separate legal entity, since to regard it in an inquiry like the one before us would be subversive of the purpose for which it was invented, is there, upon an analysis of the agreement, room for doubt that the act of all the stockholders, officers, and directors of the company in signing it should be imputed to them as an act done in their capacity as a corporation? We think not, since thereby all the property and business of the company is, and was intended to be, virtually transferred to the Standard Oil Trust, and is controlled, through its trustees, as effectually as if a formal transfer had been made by the directors of the company. On a question of this kind, the fact must constantly be kept in view that the metaphysical entity has no thought or will of its own; that every act ascribed to it emanates from and is the act of the individuals personated by it; and that it can no more do an act, or refrain from doing it, contrary to the will of these natural persons, than a house could be said

to act independently of the will of its owner; and, where an act is ascribed to it, it must be understood to be the act of the persons associated as a corporation, and, whether done in their capacity as corporators or as individuals, must be determined by the nature and tendency of the act.

It therefore follows, as we think, from the discussion we have given the subject, that where all, or a majority, of the stockholders comprising a corporation do an act which is designed to affect the property and business of the company, and which, through the control their numbers give them over the selection and conduct of the corporate agencies, does affect the property and business of the company, in the same manner as if it had been a formal resolution of its board of directors, and the act so done is *ultra vires* of the corporation and against public policy, and was done by them in their individual capacity for the purpose of concealing their real purpose and object, the act should be regarded as the act of the corporation; and, to prevent the abuse of corporate power, may be challenged as such by the state in a proceeding in *quo warranto*.

2. That the nature of the agreement is such as to preclude the defendant from becoming a party to it is, we think, too clear to require much consideration by us. In the first place, whether the agreement should be regarded as amounting to a partnership between the several companies, limited partnerships, and individuals who are parties to it, it is clear that its observance must subject the defendant to a control inconsistent with its character as a corporation. Under the agreement, all but seven of the shares of the capital stock of the company have been transferred by the real owners to the trustees of the trust, who hold them in trust for such owners; and, being enjoined by the terms of the agreement to endeavor to have "the affairs" of the several companies managed in a manner most conducive to the interests of the holders of the trust certificates issued by the trust, have the right, in virtue of their apparent legal ownership and by the terms of the agreement, to select such directors of the company as they may see fit; nay, more, may in fact select themselves. The law requires that a corporation should be controlled and managed by its directors in the interest of its own stockholders,

and conformably to the purpose for which it was created by the laws of its state. By this agreement—indirectly it is true, but none the less effectually—the defendant is controlled and managed by the Standard Oil Trust, an association with its principal place of business in New York city, and organized for a purpose contrary to the policy of our laws. Its object was to establish a virtual monopoly of the business of producing petroleum, and of manufacturing, refining, and dealing in it and all its products throughout the country, and by which it might not merely control the production, but the price, at its pleasure. All such associations are contrary to the policy of our state, and void. *Salt Co. v. Guthrie*, 35 Ohio St. 666; *Emery v. Candle Co.*, 47 Ohio St. 320, 24 N. E. Rep. 660. “The word ‘trust,’ ” says Mr. Cook, “was first used to mean an agreement between many stockholders in many corporations to place all their stock in the hands of trustees, and receive therefor trust certificates from the trustees. The stockholders thereby consolidated their interests, and became trust certificate holders. The trustees own the stock, vote it, elect the officers of the various corporations, control the business, receive all the dividends on the stock, and use all these dividends to pay dividends on the trust certificates. The trustees are periodically elected by the trust certificate holders. The purpose of the ‘trust’ is to control prices, prevent competition, and cheapen the cost of production. The Standard Oil Trust, the American Cotton Seed Oil Trust, and the Sugar Trust are examples of this method of combination.” Cook, *Stocks*, § 503a. See, also, *Wait, Insolv. Corp.* § 478.

Much has been said in favor of the objects of the Standard Oil Trust, and what it has accomplished. It may be true that it has improved the quality and cheapened the costs of petroleum and its products to the consumer. But such is not one of the usual or general results of a monopoly; and it is the policy of the law to regard, not what may, but what usually, happens. Experience shows that it is not wise to trust human cupidity where it has the opportunity to aggrandize itself at the expense of others. The claim of having cheapened the price to the consumer is the usual pretext on which monopolies of this kind are defended, and is well answered in *Richardson v. Buhl*, 77 Mich. 632, 43 N. W. Rep. 1102. After commenting

on the tendency of the combination known as the "Diamond Match Company" to prevent fair competition and to control prices, CHAMPLIN, J., said: "It is no answer to say that this monopoly has in fact reduced the price of friction matches. That policy may have been necessary to crush competition. The fact exists that it rests in the discretion of this company at any time to raise the price to an exorbitant degree."

Monopolies have always been regarded as contrary to the spirit and policy of the common law. The objections are stated in the "Case on Monopolies," *Darey v. Allein*, Coke, pt. 11, 84b. They are these: (1) "That the price of the same commodity will be raised, for he who has the sole selling of any commodity may well make the price as he pleases." (2) "The incident to a monopoly is that, after the monopoly is granted, the commodity is not so good and merchantable as it was before; for the patentee, having the sole trade, regards only his private benefit, and not the common wealth." (3) "It tends to the impoverishment of divers artificers and others, who before, by the labor of their hands in their art or trade, had maintained themselves and their families, who will now of necessity be constrained to live in idleness and beggary." The third objection, though frequently overlooked, is none the less important. A society in which a few men are the employers and the great body are merely employes or servants, is not the most desirable in a republic; and it should be as much the policy of the laws to multiply the numbers engaged in independent pursuits or in the profits of production as to cheapen the price to the consumer. Such policy would tend to an equality of fortunes among its citizens, thought to be so desirable in a republic, and lessen the amount of pauperism and crime. It is true that in the case just cited the monopoly had been created by letters patent. But the objections lie not to the manner in which the monopoly is created. The effect on industrial liberty and the price of commodities will be the same whether created by patent or by an extensive combination among those engaged in similar industries, controlled by one management. By the invariable laws of human nature, competition will be excluded and prices controlled in the interest of those connected with the combination or trust.

3. The defendant relies upon a provision in section 6789, Rev. St., as a bar to the action. That provision is as follows:

“Nothing in this chapter contained shall authorize an action against a corporation for forfeiture of charter, unless the same be commenced within five years after the act complained of was done or committed.”

It is contended, however, by counsel for the plaintiff, that this section does not apply to a proceeding instituted on behalf of the state by the attorney general to forfeit the charter of a corporation; that it was only intended to apply to like proceedings by prosecuting attorneys. The argument is based upon what is claimed to have been the law prior to the revision, and that there could have been no intention to change it in this regard by the above provision. We cannot adopt this conclusion. It is contained in the very chapter under which the proceeding was commenced by the attorney general. It contains no exception, and we are not warranted in making one against the plain language of the statute.

It is further contended that the provision does not apply by reason of the fact, as averred in the petition, “that the plaintiff had no knowledge of the existence of either of the aforesaid agreements, or of the acts hereinbefore recited, until the latter part of the year 1889.” The general rule is that a party’s want of knowledge does not prevent the running of the statute of limitations against an action that has accrued in his favor; and the only exception is concealment or fraud on the part of the defendant, which is expressly confined by our statute to “an action for relief on the ground of fraud.” Section 4982, Rev. St. This is not such an action, and fraud in fact is not averred; it is simply want of knowledge on the part of the plaintiff.

But the whole of section 6789, Rev. St., is not quoted by the defendant. It further proceeds: “Nor shall an action be brought against a corporation for the exercise of a power or franchise under its charter which it has used and exercised for a term of twenty years.” Therefore within that time such a proceeding may be brought. The defendant, as we have shown, in making and entering into the trust agreements, exercised a power for which it had no authority under the laws of this state, and is continuing to perform the agreement on its part. In addition to a prayer for the forfeiture of the defendant’s right to be a corporation, the state prays for such

other relief as to the court may seem just and proper; and, in the opinion of the court, the defendant should be ousted from the power to make and perform the agreement set forth in the petition, or any part of it. And in this connection it is proper to say that, in the judgment of the court, if the company, through its directors or otherwise, should hereafter recognize the transfers of the shares that have been made on its stock-books to the trustees provided for it in the trust agreement, or should hereafter make such transfers, or should pay dividends to them instead of to the real owners of the shares, or should permit such trustees to vote on shares so held by them in the election of its directors, in every such case it must be regarded and held as performing the agreement in violation of the judgment of this court.

Judgment ousting the defendant from the right to make the agreement set forth in the petition, and of the power to perform the same.

MORRIS RUN COAL CO. v. BARCLAY COAL CO.

(Supreme Court of Pennsylvania, 1871. 68 Pa. St. 173.)⁸⁵

The opinion of the court was delivered, May 8th, 1871, by AGNEW, J. This was an action on a bill drawn upon one party in favor of another party to a contract between five coal companies, for a sum found due in the equalization of prices under the contract. It raises a question of great importance to the citizens of this state and the state of New York, where the contract was made, and was in part to be executed, to wit: whether the contract was illegal, as being contrary to the statute of New York, or at common law, or against public policy. The instrument bears date the 15th day of February, 1866. The parties are five coal companies, incorporated under the laws of Pennsylvania, to wit: The Fall Brook Coal Company and Morris Run Coal Company, of the Blossburg coal region; and the Barclay Coal Company, Fall Creek Bituminous Coal Company, and Towanda Coal Company, of the Barclay coal region. By the agreement the mar-

⁸⁵—Only the opinion of the court is given.

ket for the bituminous coal from these two regions is divided among these parties in certain proportions. A committee of three is appointed to take charge and control of the business of all these companies, to decide all questions by a certain vote, and to appoint a general sales agent to be stationed at Watkins, New York. Provision is made for the mining and delivery of coal, their kinds, and for its sale through the agent, subject, however, to this important restriction, that each party shall, at its own costs and expense, deliver its proportion of the different kinds of coal in the different markets *at such times and to such parties as the committee shall from time to time direct*. The committee is authorized to adjust the *prices of coal in the different markets* and the rates of freight and also to enter into such an agreement with the anthracite coal companies as will promote the interest of these parties. Then comes an important provision that the companies may sell their coal themselves, but only to the *extent of their proportion*, and only *at the prices adjusted by the committee*. It is also provided that the general sales agent shall direct a suspension of shipment or deliveries of coal by any party making sales or deliveries *beyond its proportion*, and thereupon such party *shall suspend shipments* until the committee shall direct a resumption. Detailed reports of the business are to be made by the companies to the general sales agent at fixed and short intervals, and settlements are to be made by the committee monthly, prices averaged, and payments made by the companies in excess to those in arrear; and finally, each party binds itself *not to cause or permit any coal to be shipped or sold otherwise than as the same has been agreed upon, and that all rules and regulations by the executive committee in relation to the business shall be faithfully carried out*.

In regard to the relation these companies hold to the public, the field of their mining operations, the markets they supply, the extent of their coal-fields, and the general supply of coal, the distinguished referee, Judge ELWELL, finds as follows: "The Barelay and Blossburg coal-mines are the only coal-mines furnishing the kind of coal mined and shipped by these companies, except the Cumberland coal, which latter, in order to reach the same markets, north, would have to be shipped by tidewater. There was some of the same kind of coal mined in

McKean and Elk counties, in this state, but in quantities so small as that it was not considered by these companies as coming into competition with them. The coal of the Blossburg and Barclay regions is adapted to mechanical purposes and for generating steam. Wherever sold it comes into competition with anthracite coal, and also with the Cumberland coal sent by tidewater to Troy, New York, to which point both kinds of bituminous coal are shipped."

During the season of 1866 these companies made sales of coal at Oswego and Buffalo to parties who shipped to Chicago, Milwaukee and other western cities. It there came into competition to some extent with Pittsburg coal. The latter is used for making gas, but the coal of these companies cannot be used for that purpose.

The referee found that the statute of New York is, "if two or more persons shall conspire," first, "to commit any offence;" second, "to commit any act injurious to the public health, to public morals, or to trade or commerce, they shall be deemed guilty of a misdemeanor."

The referee found, as his conclusion upon the whole case, that the contract was void by the statute, and void at common law, as against public policy. The restraint of the contract upon trade and its injury to the public is thus clearly set forth by the referee: "These corporations (he says) represented almost the entire body of bituminous coal in the northern part of the state. By combination between themselves they had the power to control the entire market in that district. And they did control it by a contract not to ship and sell coal otherwise than as therein provided. And in order to destroy competition they provided for an arrangement with dealers and shippers of anthracite coal. They were thereby prohibited from selling under prices to be fixed by a committee representing each company. And they were obliged to suspend shipments upon notice from an agent that their allotted share of the market had been forwarded or sold. Instead of regulating the business by the natural laws of trade, to wit, those of demand and supply, these companies entered into a league, by which they could limit the supply below the demand in order to enhance the price. Or if the supply was greater than the demand, they could nevertheless compel the payment

of the price arbitrarily fixed by the joint committee. The restraint on the trade in bituminous coal was by this contract as wide and extensive as the market for the article. It already embraced the state of New York, and was intended and no doubt did affect the market in the Western States. It is expressly stipulated that the parties to this contract shall not be considered as partners. The agreement was not entered into for the purpose of aggregating the capital of the several companies, nor for greater facilities for the transaction of their business, nor for the protection of themselves by a reasonable restraint, as to a limited time and space, upon others who might interfere with their business."

The plaintiff in error's reply to this vigorous statement of the purpose of the contract and its effect upon the public interest, alleges that its true object was to lessen expenses, to advance the quality of the coal, and to deliver it in the markets it was to supply, in the best order, to the consumer. This is denied by the defendants; but it seems to us it is immaterial whether these positions are sustained or not. Admitting their correctness, it does not follow that these advantages redeem the contract from the obnoxious effects so strikingly presented by the referee. The important fact is that these companies control this immense coal-field; that it is the great source of supply of bituminous coal to the state of New York and large territories westward; that by this contract they control the price of coal in this extensive market, and make it bring sums it would not command if left to the natural laws of trade; that it concerns an article of prime necessity for many uses; that its operation is general in this large region, and affects all who use coal as a fuel; and this is accomplished by a combination of all the companies engaged in this branch of business in the large region where they operate. The combination is wide in scope, general in its influence, and injurious in effects. These being its features, the contract is against public policy, illegal, and therefore void.

The illegality of contracts affecting public trade appears in the books under many forms. The most frequent is that of contracts between individuals to restrain one of them from performing a business or employment. The subject was elaborately discussed in the leading case of *Mitchell v. Reynolds*,

1 Peere Williams 181, to be found also in 1 Smith's Lead. Cases 172. The distinction is there taken which now marks the current of judicial decision everywhere; that a restraint upon a trade or employment which is general, is void, being contrary to public interest, really beneficial to neither party, and oppressive at least to one. "General restraints (says PARKER, J.) are all void, whether by bond, covenant or promise, with or without consideration, and whether it be of the party's own trade or not;" citing Croke Jam. 596; 2 Buls. 136; Allen 67. To obtain, he says, the sole exercise of any known trade throughout England, is a complete monopoly, and against the policy of the law. A reason given is "the great abuses these voluntary restraints are liable to, as, for instance, from corporations, who were perpetually laboring for exclusive advantages in trade, and to reduce it into as few hands as possible." In reference to a contract not to trade in any part of England, it is said, there is something more than a presumption against it, because it never can be useful to any man to restrain another from trading in all places, though it may be to restrain him from trading in some, unless he intends a monopoly, which is a crime. These principles have been sustained in many cases which need not be cited, as most of them will be found in Mr. Smith's note to the leading case. The result of those in which particular restraints upon trade have been held to be valid between individuals is, that the restraint must be partial only, the consideration adequate and not colorable, and the restriction reasonable. Upon the last requisite, TENDAL, C. J., remarks in *Homer v. Graves*, 7 Bing. 743:—

"We do not see how a better test can be applied to the question whether reasonable or not than by considering whether the restraint is such only as to afford a fair protection as to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatsoever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive, and if oppressive, it is in the eye of the law unreasonable. What is injurious to the public interest is void on the ground of public policy."

Many cases have been decided as to what is a reasonable

restriction and what is not, and is therefore void, but two only may be referred to as illustrations. In *Mallan v. May*, 11 M. & W. 653, a covenant not to practice as a dentist in London, or in any of the places in England or Scotland, where the plaintiff might have been practising before the expiration of the term of service with them was held to be reasonable as to the limit of London, but unreasonable and void as to the remainder of the restriction. So in *Green v. Price*, 13 M. & W. 695, a covenant not to follow the perfumery business in the cities of London and Westminster, or within the distance of 600 miles therefrom, was good as to the cities and void as to the limit of 600 miles. See also *Pierce v. Fuller*, 8 Mass. 223, and *Chappel v. Brockway*, 21 Wend. 158. An important principle stated in these cases is that as to contracts for a limited restraint the courts start with a presumption that they are illegal unless shown to have been made upon adequate consideration, and upon circumstances both reasonable and useful. This presumption is a necessary consequence of the general principle, that the public interest is superior to private, and that all restraints on trade are injurious to the public in some degree. The general rule (said WOODWARD, C. J.) is that all restraints of trade, if nothing more appear, are bad: *Keeler v. Taylor*, 3 P. F. Smith 468. That case may be instanced as a strong illustration of the rule as to what is not a reasonable restriction; and the principles I have been stating are recognised in the opinion. Keeler agreed to instruct Taylor in the art of making platform scales, and to employ him in that business at \$1.75 per day. Taylor engaged to pay Keeler or his legal representatives \$50 for each and every scale he should thereafter make for any other person than Keeler, or which should be made by imparting his information to others. This was held to be an unreasonable restriction upon Taylor's labor, and therefore void, as in restraint of trade. Testing the present contracts by these principles, the restriction laid upon the production and price of coal cannot be sanctioned as reasonable, in view of their intimate relation to the public interests. The field of operation is too wide and the influence too general.

The effects produced on the public interests lead to the consideration of another feature of great weight in determining

the illegality of the contract, to wit: the combination resorted to by these five companies. Singly each might have suspended deliveries and sales of coal to suit its own interests, and might have raised the price, even though this might have been detrimental to the public interest. There is a certain freedom which must be allowed to every one in the management of his own affairs. When competition is left free, individual error or folly will generally find a correction in the conduct of others. But here is a combination of all the companies operating in the Blossburg and Barclay mining regions, and controlling their entire productions. They have combined together to govern the supply and the price of coal in all markets from the Hudson to the Mississippi rivers, and from Pennsylvania to the lakes. This combination has a power in its confederated form which no individual action can confer. The public interest must succumb to it, for it has left no combination free to correct its baleful influence. When the supply of coal is suspended, the demand for it becomes importunate, and prices must rise. Or if the supply goes forward, the price fixed by the confederates must accompany it. The domestic hearth, the furnaces of the iron master, and the fires of the manufacturer, all feel the restraint, while many dependent hands are paralyzed, and hungry mouths are stinted. The influence of a lack of supply or a rise in the price of an article of such prime necessity, cannot be measured. It permeates the entire mass of community, and leaves few of its members untouched by its withering blight. Such a combination is more than a contract; it is an offence. "I take it," said GIBSON, J., "a combination is criminal whenever the act to be done has a necessary tendency to prejudice the public or to oppress individuals, by unjustly subjecting them to the power of the confederates, and giving effect to the purpose of the latter, whether of extortion or of mischief." *Commonwealth v. Carlisle*, Brightly's Rep. 40. In all such combinations where the purpose is injurious or unlawful, the gist of the offence is the conspiracy. Men can often do by the combination of many, what severally no one could accomplish, and even what when done by one would be innocent. It was held, in the *Commonwealth v. Eberle*, 3 S. & R. 9, that it was an indictable conspiracy for a portion of a

German Lutheran congregation to combine and agree together to prevent another portion of the congregation, by force of arms, from using the English language in the worship of God among the congregation. So a confederacy to assist a female infant to escape from her father's control with a view to marry her against his will, is indictable as a conspiracy at common law, while it would have been no criminal offense if one alone had induced her to elope with and marry him: *Mifflin v. Commonwealth*, 5 W. & S. 461. One man or many may hiss an actor; but if they conspire to do it they may be punished: per GIBSON, C. J., *Hood v. Palm*, 8 Barr 238; 2 Russell on Crimes 556. And an action for a conspiracy to defame will be supported though the words be not actionable, if spoken by one: *Hood v. Palm*, *supra*. "Defamation by the outcry of numbers," says GIBSON, C. J., "is as resistless as defamation by the written act of an individual." And says COULTER, J., "The concentrated energy of several combined wills, operating simultaneously and by concert upon one individual, is dangerous even to the cautious and circumspect, but when brought to bear upon the unwary and unsuspecting, it is fatal:" *Twitchell v. Commonwealth*, 9 Barr 211. There is a potency in numbers when combined, which the law cannot overlook where injury is the consequence. If the conspiracy be to commit a crime or an unlawful act, it is easy to determine its indictable character. It is more difficult when the act to be done or purpose to be accomplished is innocent in itself. Then the offence takes its hue from the motives, the means or the consequences. If the motives of the confederates be to oppress, the means they use unlawful, or the consequences to others injurious, their confederation will become a conspiracy. Instances are given in the *Commonwealth v. Carlisle*, Bright. R. 40. Among those mentioned as criminal is a combination of employers to depress the wages of journeymen below what they would be, if there were no resort to artificial means; and a combination of the bakers of a town to hold up the article of bread, and by means of the scarcity thus produced to extort an exorbitant price for it. The latter instance is precisely parallel with the present case. It is the effect of the act upon the public which gives that case and this its evil aspect as the result of confederation; for any

baker might choose to hold up his own bread, or coal operator his coal, rather than to sell at ruling prices; but when he destroys competition by a combination with others, the public can buy of no one.

In *Rex. v. DeBerenquetal*, 3 M. & S. 67, it was held to be a conspiracy to combine to raise the public funds on a particular day by false rumors. The purpose itself, said Lord ELLENBOROUGH, is mischievous—it strikes at the price of a valuable commodity in the market, and if it gives a fictitious price by means of false rumors, it is a fraud levelled against the public, for it is against all such as may possibly have anything to do with the funds on that particular day. Every “corner,” in the language of the day, whether it be to affect the price of articles of commerce, such as breadstuffs, or the price of vendible stocks, when accomplished by confederation to raise or depress the price and operate on the markets, is a conspiracy. The ruin often spread abroad by these heartless conspiracies is indescribable, frequently filling the land with starvation, poverty and woe. Every association is criminal whose object is to raise or depress the price of labor beyond what it would bring if it were left without artificial aid or stimulus: *Rex v. Byerdike*, 1 M. & S. 179. In the case of such associations the illegality consists most frequently in the means employed to carry out the object. To fix a standard of prices among men in the same employment, as a free bill, is not in itself criminal, but may become so when the parties resort to coercion, restraint or penalties upon the employed or employers, or what is worse, to force of arms. If the means be unlawful the combination is indictable: *Commonwealth v. Hunt*, 4 Mete. 111. A conspiracy of journeymen of any trade or handicraft to raise the wages by entering into combination to coerce journeymen and master workmen employed in the same branch of industry to conform to rules adopted by such combination for the purpose of regulating the price of labor, and carrying such rules into effect by overt acts, is indictable as a misdemeanor: 3 Whart., C. L., citing *The People v. Fishbee*, 14 Wend. 9. Without multiplying examples, these are sufficient to illustrate the true aspect of the case before us, and to show that a combination such as these companies entered into to control the supply and price

of the Blossburg and Barelay regions is illegal and the contract therefore void.

A second question is, whether the bill drawn in this case by the general sales agent on the Barelay Coal Company in favor of the Morris Coal Company to equalize prices upon a settlement under the contract, is such an independent cause of action as will support the suit. When a bill, note or bond is but an instrument to execute an illegal contract, it is tainted by the illegality and cannot be recovered. The illegal consideration enters directly into the instrument, and is followed up because the law will not permit itself to be violated by mere indirection. This is the principle mentioned in the cases of *Stears v. Lashley*, 6 Term Rep. 61; *Swan v. Scott*, 11 S. & R. 164; *Stanton v. Allen*, 5 Denio 434; *Fisher v. Bridges*, 3 E. & B. 642; *Lestapies v. Ingraham*, 5 Barr 82. In the last case, GIBSON, C. J., says: "The solemnity of the security would not preclude an inquiry into the consideration of it had it been illegal;" and in *Swan v. Scott*, DUNCAN, J., said of a bond, the consideration of which grew out of an illegal transaction, "there the illegal consideration is the sole basis of the bond, and there can be no recovery." In the present case the bill itself refers directly to the equalization account, and was given in immediate execution of the contract. This being the case, it is distinguishable from *Fackney v. Reynous*, 4 Burrows 2065; *Petrie v. Hannay*, 3 Term R. 418; *Warner v. Russell*, 1 Bos. & Pul. 295; *Lestapies v. Ingraham*, *supra*; *Thomas v. Bracey*, 10 Barr 164—cases where the action was not upon the illegal contract, or upon an instrument in execution of it, but was founded upon a new consideration. The distinction is well stated by Judge WASHINGTON, in *Toler v. Armstrong*, 3 Wash. C. C. R. 297, affirmed in the Supreme Court U. S., 11 Wheat. 258. The present case is free of difficulty, the money represented by the bill arising directly upon the contract to be paid by one party to another party to the contract in execution of its terms. The bill itself is therefore tainted by the illegality, and no recovery can be had upon it.

The judgment is therefore affirmed.

CENTRAL OHIO SALT CO. v. GUTHRIE

(Supreme Court of Ohio, 1880. 35 Oh. St. 666.)

Error to the District Court of Muskingum county.

The original action was brought in the Court of Common Pleas of Muskingum county by the plaintiff in error against defendant in error, to recover the possession of a thousand barrels of salt. An order of delivery was issued to the sheriff of said county. The defendant, by answer, denied the right of the plaintiff to the possession of the property, and by cross-petition alleged, among other things, that the contract under which the plaintiff claimed was illegal and void, and prayed for an injunction, restraining the plaintiff from interfering in any manner with the property in dispute. The salt in question was manufactured by defendant at his salt furnace, known as the Harrison furnace, in the Muskingum valley. The plaintiff is an unincorporated association of salt manufacturers, doing business in the Muskingum and Hocking valleys, formed for the purpose of controlling the manufacture and sale of salt in those valleys, and is composed of thirty or more parties, engaged separately and independently in the manufacture of salt. The articles of association are in writing, of which the following is a copy:

"We, the undersigned, owners of and lessees of the salt furnaces of the Muskingum and Hocking valleys, for the purpose of regulating the prices and sustaining the quality of salt made by and for us, do hereby agree, and do bind ourselves, each with and to the others; jointly and severally, and our heirs, executors, administrators, and assigns, to the terms and conditions of the following contract, to wit: We agree that from this fifteenth day (15th) of September, 1871, and for a period of five years from the above date, we do hereby form ourselves into an association for the sale and transportation of salt.

"The association shall be called and known by the name of the Central Ohio Salt Company.

"The officers of the company shall consist of a president and five directors; two of the said directors shall be chosen from the Hocking valley and two more from the Muskingum valley, and one from Guernsey county, Ohio.

"The annual meeting of the company shall be holden at the company's office, on the second Tuesday of May of each year, for the election of directors and the transaction of such other business as may come before the meeting, except that the first election shall be held immediately after the organization of the association, at such time and place as may be agreed upon by the members of the association.

"The representation of the stockholders shall be one vote to each furnace.

"It shall be the duty of the directors to regulate the price and grades of salt, and settle all disputes and questions in regard to the same; also to employ an agent or agents, who shall be governed by them in all matters pertaining to the business of the company. The directory shall require a satisfactory bond from the agents for the faithful discharge of his or their duties, and safe-keeping of the funds of the company while in his possession.

"A majority of the board of directors shall constitute a quorum to do business.

"The manner and time of receiving and distributing salt shall be under the control of the directory.

"All salt made or owned by the members of this association shall be branded as the directors may require, and becomes the property of the company when packed out in barrels.

"Each member of the association binds himself to sell salt *only* at retail, and then only to actual consumers at the place of manufacture, and at such prices as may be fixed by the directors from time to time.

"And it is further agreed by the members of this association, that in case of any sale, lease, or other disposition of any furnace or furnaces now owned, operated, or controlled by them, such sale, lease, or transfer, shall be subject to each and all of the conditions of this agreement, and the vendee or lessee shall at once become a member of this association.

"For the faithful performance of the covenants and stipulations herein named, we do severally bind ourselves, executors, heirs, administrators, and assigns, to the association in the sum of two thousand dollars (\$2,000), which sum shall be taken as liquidated damages, to be paid by any party who may fail in such faithful performance.

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"This contract may be amended by a two-thirds vote of the members of this association.

"In case of any removal, resignation, or death of any member of the directory, it shall be the duty of the association to elect some one to fill the vacancy without delay.

"In testimony whereof, we have hereunto subscribed our names and affixed our seals, this 31st day of August, 1871.

"Salina Salt and Coal Co. [SEAL.] By G. T. Gould.
Hocking Valley Coal & Salt Co., by John McCracken, Acting Director.

E. M. Scott. [SEAL.]

Henry Krigbaum.

J. R. Patterson.

John T. Havener.

Jesse S. Baker.

James Moore.

John Stevens.

S. H. Guthrie.

O. Ballou.

Ben. C. Converse.

Abraham Morrison.

S. A. Guthrie.

George McClure.

C. Kinsel.

H. Blandy.

Hiram Cowell.

Caleb Wilson, Sen.

"I, James Morrison, for myself and Charles Stone, do hereby agree to pay to the directors of the Central Ohio Salt Company ten cents per barrel for all the salt that we shall manufacture and sell, so long as the said company shall keep the price at not less than one dollar and seventy-five cents per barrel, at Zanesville, Ohio, for the term of five years from this date, and we do bind ourselves to be governed by the Central Ohio Salt Company's rates, and not to undersell them at any time during said term of five years.

"September 27, 1871.

James Morrison.

"W. O. Sherwood.

William Sherwood.

E. M. Stanberry.

Havener & Benjamin.

C. Wilson, Jr.

J. W. Kinzel.

E. Sherwood.

Henry Stainbrook.

B. Wilson.

B. Kinzel.

S. H. Guthrie, Agent Harrison Furnace, and for his wife."

"Amended September 7, 1871:

"It is understood and agreed, that the penalty in the foregoing article of association (of \$2,000) shall only apply to each individual who may violate the same.

"These articles of association shall not be binding upon

any until all the salt-makers and lessees in Hocking and Muskingum valleys have signed the same.

"Joseph Kelly, Jonathan Barnes, Joseph Herrald, to have privilege of retailing salt at my mill."

The case made by the cross-petition of defendant was tried in the court of common pleas, where a decree was rendered in his favor. On appeal to the district court a like decree was rendered.

On the trial, testimony was offered showing that salt manufactured in other localities was placed in the same markets with the salt under the control of the plaintiff, and also, that the association does not include all the manufacturers of Salt within the valleys of the Muskingum and Hocking rivers. It also appears that defendant, for some time after the organization of the plaintiff, complied with the terms of the articles, but afterward refusing to deliver to the company, salt manufactured by him, the original action was brought to enforce the agreement.

McILVANE, C. J. The only questions made in the argument of this case relate to the validity of the contract of association. No objection has been made, in this court, or the courts below, as to the nature of the relief sought by the cross-petition of defendant, and that question has not been considered. That all contracts in partial restraint of trade are not void as against public policy, is too well settled to be gainsaid; while, on the other hand, it is as fully established, as a general rule, that contracts in general restraint of trade are against public policy, and, therefore, absolutely void. Upon the authorities, however, the line, between such as are void and those that are binding, is not very clearly defined.

Public policy, unquestionably, favors competition in trade, to the end that its commodities may be afforded to the consumer as cheaply as possible, and is opposed to monopolies, which tend to advance market prices to the injury of the general public.

We think the contract before us should not be enforced. By it all the salt manufacturers (with one or two exceptions) in a large salt-producing territory, and whose aggregate annual product is about 140,000 barrels, have combined for the expressed purpose of regulating the "price and grade of

salt." A board of directors is chosen. All salt made or owned by the members, as soon as packed into barrels, is placed under the control of the directors. "The manner and time of receiving and distributing salt shall be under the control of the directory." "Each member of the association binds himself to sell salt only at retail, and then only to actual consumers, at the place of manufacture, and at such prices as may be fixed by the directors from time to time." The directors make monthly reports of sales, and pay over the proceeds to the members, in proportion to the amount of salt received from each.

The clear tendency of such an agreement is to establish a monopoly, and to destroy competition in trade, and for that reason, on grounds of public policy, courts will not aid in its enforcement. It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public.

Nor is this agreement within the principle which permits a person to bind himself not to engage in trade at a particular place. Here the restraint was general. A member of this association, under this agreement, could not engage in the traffic at any place during the life of the association, except only to retail to actual consumers, at the place of manufacture, and then only from salt in bulk, and at the price named by the company.

It is also claimed, on behalf of the plaintiff, that this agreement does not affect the right of the members to continue the industry in which they are engaged without restraint; that the company can not control or limit the quantity of salt to be manufactured, and, therefore, the contract does not injuriously affect the interest of labor. We think that the provision that "the manner and time of receiving and distributing salt shall be under the control of the directory," confers upon the company ample power to embarrass the freedom of the members as to the quantity of salt which they might wish to manufacture. There is no agreement that the company will receive all the salt manufactured, and at the time when it may be ready for sale.

On the whole case, we are clearly of opinion that this agreement is void as against public policy.

*Judgment affirmed.*⁸⁶

PEOPLE v. SHELDON

(Court of Appeals of New York, 1893. 139 N. Y. 251.)

Appeal from the affirmance by the general term, fifth department, of judgment of conviction in the Niagara county sessions on indictment for conspiracy. The indictment set forth an agreement between the defendants and others, comprising all the retail coal dealers in the city of Lockport, except one, entered into in March, 1892, to organize the Lockport Coal Exchange, which agreement was as follows:

“Constitution and By-Laws.

“Name. The name of this exchange shall be the Lockport Coal Exchange.

“Objects. The objects of this exchange shall be to foster trade and commerce in coal, wood, and all the products appertaining to the same; to protect and secure freedom from unjust and unlawful exactions; to diffuse accurate and reliable information as to the retail coal trade, and of the responsibility and standing of customers, and other matters, among its members, for their mutual protection and benefit; to settle differences between its members; to produce uniformity and certainty in the customs and usages of such trade; to promote a more enlarged and friendly intercourse between merchants and dealers in coal and wood; and to provide, establish, and maintain such rules and regulations as may be proper and necessary for the mutual co-operation, interest,

86—*Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510 (combination of powder manufacturers—price fixed); *Pittsburg Carbon Co. v. McMillin*, 119 N. Y. 46; *Hooker v. Vandewater*, 4 Denio (N. Y.), 349 (proprietors of boat lines combined and fixed prices, subject to change); *Stanton v. Allen*, 5 Denio (N. Y.), 434 (proprietors of

boat lines combined and agreed to have prices fixed by a committee).

In *Sayre v. Louisville Union Ben. Assn.*, 1 Duval (Ky.), 143 (the association of proprietors of boat lines was held valid, but the by-law which provided for a fine if freight were carried for less than the established rate was illegal).

and protection of the retail dealers in coal and wood in the city of Lockport, and in furthering the coal trade interests generally. It shall be the duty of all members to strictly obey all the provisions of the constitution, by-laws, and resolutions of the exchange, and permit to the secretary the free exercise of the duties imposed upon him in enforcing them.

"Officers. The officers of the exchange shall be a president and a vice president, who shall be elected by the exchange, and who shall be members of the exchange, and also a secretary and treasurer, elected by the exchange. The officers shall hold office for the term of one year, and until their successors are elected and shall have duly qualified; and any officer may be removed from office by the five-sixths vote of all the members of the exchange, at any regular or special meeting thereof.

"Committees. There shall be such committees as the president of the board of trustees may from time to time designate.

"President and Vice President. The president shall preside at all meetings of the exchange, or, in his absence, the vice president. In the absence of the president and vice president, a presiding officer shall be chosen from the members of the exchange. The president shall be, *ex officio*, a member of all committees.

"Secretary. The secretary shall not be a member of the exchange, nor in any manner personally interested in the coal trade. He shall be elected by at least a five-sixths vote of all the members of the exchange at a regular or special meeting, due notice of said intended election having been sent by mail to each member, at his regular business address, at least five days previous to the meeting. The secretary shall keep a record of the meetings of the exchange, a register of its members, officers, and committees, and conduct all correspondence of the exchange, and perform such other duties in connection with his office as may be imposed upon him by the exchange. He shall instantly investigate all charges preferred against the members of the exchange, on all well-founded suspicions, without fear or favor, and conduct the investigation, both to obtain proof, and when presented before the exchange, and shall render his decision in each case to the exchange within ten days from the date on which charges are made, unless further time is given him by the exchange. He shall be

permitted to see any portion of the books of any member, when in pursuit of evidence of wrongdoing, and may demand an affidavit, when he thinks necessary, to refute or sustain a specific charge. He shall also collect material for, and compile, a list of persons who are poor pay, for the mutual protection and benefit of the members of the exchange. He shall also be the keeper of the seal of the exchange, and receive such salary as may be determined upon by the exchange. Before the secretary shall enter upon the duties of his office, he shall make oath that he will honestly and fearlessly perform the duties prescribed by the constitution and by-laws, and that he will keep, in honor and secrecy, any and all information by him acquired, regarding the business of the various members, as he from time to time may investigate them, except any facts connected with any violation of the laws of the exchange which the exchange or any member is entitled to know. If practicable, the secretary shall be a notary public. The secretary shall not disclose to any member of the exchange any information regarding any investigation, while he is making the same.

“Treasurer. The treasurer, who shall also be the secretary, shall have charge of the funds of the exchange, disburse the same on the order of the board of trustees, countersigned by the president, and shall report at all regular meetings, and his accounts shall be open for proper inspection at all proper times. He shall give bonds for the proper protection of the exchange.

“Membership. The exchange shall be composed of active and associate members. Active members shall comprise any retail coal dealer, firm, or company who has a yard or dock, and the usual appliances for doing a coal business, in the city of Lockport. Associate members shall comprise any individual, company, or firm that sells coal in the villages around Lockport, and who approves the objects of, and agrees to co-operate with, the exchange. Associate members shall pay an annual fee of five dollars, and shall have all the privileges of active members, except the right of voting.

“Discipline. If a member is charged with violating any provision of these by-laws, or any rule or resolution of the exchange, or of being guilty of conduct unbecoming a member, or prejudicial to its interests, or of giving short weight

or overweight, he shall be summoned before the secretary to answer the charge. If, upon the charge and defense being heard by the secretary, he shall decide to sustain the charge, the member shall be declared 'in default;' and the member shall be considered to be 'in default' until five-sixths of all the members, at a regular or special meeting, shall vote to reinstate him as a member of the exchange, in good standing. A member who shall be declared 'in default' shall absolutely and irrevocably forfeit all rights to all money, property, or other value held by the exchange, as its own or in trust, and shall also forfeit all rights of membership in the exchange, unless he be reinstated in good standing; and no member shall be so reinstated except by a five-sixths vote of all members of the exchange at a regular or special meeting assembled after proper notice, and only after depositing with the treasurer \$100 as fee for renewal of membership. When a member shall be accused by the secretary, in any open meeting of the exchange, of having violated any provision of this constitution and by-laws, or of any resolution, and evidence is lacking to absolutely refute or sustain the charge, it shall be obligatory upon such member to make proper affidavit that he has in no instance sold or delivered coal for which he has not received the full price at which the majority of the other members were selling coal of the same size at the same time, and that he has not, directly or indirectly, given any rebate, commission, or other concession equivalent to cash, thereby actually reducing the established market price made by the Lockport Coal Exchange, and that not less than two thousand and not more than two thousand pounds have, in his knowledge, been sold by himself, his partner, or his employes, or delivered as a ton. Resignations shall be made in writing to the president or secretary, and be referred to the board of trustees for their action; but no resignation will be accepted until all dues, fines, charges, and penalties against such member shall have been paid and settled. When the exchange, or secretary thereof, shall declare a member 'in default,' the secretary shall notify every member of the exchange by mail, and such notice shall be authoritative. When a member defies the exchange by persistent wrongdoing, and is declared 'in default' and persistent, the secretary shall notify the shippers

of coal to the Lockport market that the said member is 'in default' and persistent, and for this reason is not entitled to the privileges of membership in the Lockport exchange.

"Election of Members. A candidate for membership shall be proposed in writing by a member at a regular meeting of the exchange, and be recommended by two members in good standing, and at the next succeeding regular meeting be voted upon. A two-thirds vote of the members of the exchange shall be requisite to elect.

"Price of Anthracite Coal. The price of coal at retail, shall, as far as practicable, be kept uniform, and it shall require a five-sixths vote of all members of the exchange, at any meeting, to advance or reduce the retail price of coal, and no price shall be made at any time which amounts to more than a fair and reasonable advance over wholesale rates, or that is higher than the current prices of the exchanges at Rochester or Buffalo, when figured upon corresponding freight tariff; but at no time shall the price of coal at retail exceed one dollar above the costs of the same at wholesale, except by the unanimous vote of all the members of the exchange. All votes upon the price of coal shall be *viva voce*. The sale of coal shall be through the nominal channels of the trade. Soliciting shall be discouraged, and no club orders of associated buyers, to reduce prices, shall be considered or accepted. No member shall employ any person temporarily to solicit orders, either on salary or on commission, and no signs indicating, 'Orders taken for coal,' shall be displayed at groceries or other 'outside places,' and no habitual orders for second parties shall be received or filled when sent in by such agencies, whether on commission or other form of reciprocity, or only as a matter of friendship. Except that each member may have one place for taking orders, in addition to his regular yard office.

"Meetings. The annual meeting of the exchange shall be held on the first Monday of April of each year. The regular meeting shall be held on the first Monday of each month. Special meetings may be called by the president, or upon the written request of three members, which request shall be sent to the secretary, stating the object of such meeting; and the notices of any special meeting shall state the object of the

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same, and no other business shall be transacted at such meeting. At all meetings of the exchange, seven members shall constitute a quorum; but this shall not authorize them to transact any business which, under the constitution and by-laws, requires the vote of a greater number of the members. Any member may be represented at a meeting by an authorized person connected with his business, and such person shall be entitled to the privileges of such member. Any vacancies in any of the official positions of the exchange shall be filled by the board of trustees, when ordered by the president, (or in his absence by the vice president,) within two weeks after such vacancy occurs, or as soon thereafter as practicable.

“Membership Fee. There shall be a membership fee of one hundred dollars to be paid to the secretary by each member at the time of signing the constitution and by-laws, and during the first week of each month the further sum of five dollars for current expenses. At the end of the year, upon vote of the exchange, there shall be returned to such member the full amount of such monthly payment so paid in by the members, less the proper proportion due for each member for the current expenses of the exchange, which amount shall be deducted from each by the secretary. Any member of the exchange, retiring from the coal business in Lockport in good standing with the exchange, shall be entitled to receive from the treasurer the original amount paid in by said member for membership,—that is, one hundred dollars,—less any assessment for expenses or dues that may properly belong to such member to pay, upon filing an affidavit with the secretary that the said member has absolutely withdrawn from all direct or indirect interest in coal business in Lockport, and that during his term of membership he has not violated any of the provisions of the constitution and by-laws or resolutions of the Lockport Coal Exchange.

“Order of Business. At all meetings of the exchange, the order of business shall be: Calling of roll; reading of minutes; proposal of membership; reports of committees; communications, bills, or notices; unfinished business; miscellaneous business. This order of business may be suspended at any

meeting of the exchange by a vote of two-thirds of the members present.

“Records and Minutes. The minutes and records of the exchange shall be open at all times to the inspection of members.

“Amendments. This constitution and by-laws may be amended by an affirmative vote of five-sixths of the members of the exchange at a regular meeting, provided that notice of such proposed amendment shall have been presented in writing at a previous regular meeting.

“We, the undersigned, agree to abide by the above constitution and by-laws of the Lockport Coal Exchange. James Lennon & Son. Angevine & Hoover. P. B. Tuohey. Charles Whitmore & Co. J. Mare. Fowler. Sheldon N. Cook. Upson & Stevens. E. S. Brown. M. W. Carr. Ferrin Bros. Co., Inc. M. McManus. Edward B. Jelly.”

The indictment, among other things, alleged that the agreement constituted an unlawful conspiracy to raise, increase, and augment the rates and prices of coal, at retail, in the city of Lockport, and to destroy free competition among the signers of the agreement and others, in the sale of coal in said city, and to compel the consumers of coal to pay therefor the prices fixed by the coal exchange. It alleged that, in pursuance of said conspiracy, the defendants and others, members of said exchange, organized the same, elected officers, and by resolution did “fix, determine, and establish the rate and price of anthracite coal at retail, in said city, at four dollars and seventy-five cents per ton for egg, chestnut, stove, and grate coal, and three dollars and seventy-five cents per ton for pea coal, and other higher rates for small quantities of the same; said rates and prices so fixed, determined, and established being over seventy-five cents per ton higher and in advance of the then market price of such coal at retail in said city.” The indictment alleged an unlawful intent, and concluded by an averment that the “conspiracy as aforesaid, so carried into execution as aforesaid, is of grievous injury to trade and commerce, prejudicial to the public good and welfare, against the form of the statute,” etc. The proof established the execution of the agreement as alleged; the organization of the exchange by the election of officers; the fixing of

the price of coal at an advance beyond the then market price, which price was thereafter charged therefor; the notification of the wholesale dealers, by the secretary, of the organization of the exchange, with the names of the members. Other facts are set forth in the opinion.

ANDREWS, C. J. Section 168 of the Penal Code makes it a misdemeanor for two or more persons to conspire (subd. 6) "to commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of public justice, or of the due administration of the laws." The Revised Statutes contained a similar provision. 2 Rev. St. p. 692, § 8, subd. 6.

The fact that the defendants subscribed the constitution and by-laws of the Lockport Coal Exchange, and participated in its management, was not controverted on the trial. Nor was there any dispute that the object of the organization was to prevent competition in the price of coal among the retail dealers, acting as the Lockport Coal Exchange, by constituting the exchange the sole authority to fix the price which should be charged by the members, individually, for coal sold by them. Nor is there any dispute that, in pursuance of the plan, the exchange did proceed to fix the price of coal, and that the parties to the agreement were thereafter governed thereby in making sales to their customers. Nor is it questioned that the price first established was 75 cents in advance of the then market price, and that there was afterwards a still further advance. The defendants gave evidence tending to show (and of this there was no contradiction) that before and at the time of the organization of the exchange the excessive competition between the dealers in coal in Lockport had reduced the price below the actual cost of the coal and the expense of handling, and that the business was carried on at a loss. It was not shown that the prices of coal, fixed from time to time by the exchange, were excessive or oppressive, or were more than sufficient to afford a fair remuneration to the dealers. The trial judge submitted the case to the jury upon the proposition that if the defendants entered into the organization agreement for the purpose of controlling the price of coal, and managing the business of the sale of coal, so as to

prevent competition in price between the members of the exchange, the agreement was illegal, and that if the jury found that this was their intent, and that the price of coal was raised in pursuance of the agreement to effect its object, the crime of conspiracy was established. The correctness of this proposition is the main question in the case. If a combination between independent dealers, to prevent competition between themselves in the sale of an article of prime necessity, is, in the contemplation of the law, an act inimical to trade or commerce, whatever may be done under and in pursuance of it, and although the object of the combination is merely the due protection of the parties to it against ruinous rivalry, and no attempt is made to charge undue or excessive prices, then the indictment was sustained by proof. On the other hand, if the validity and legality of an agreement having for its object the prevention of competition between dealers in the same commodity depend upon what may be done under the agreement, and it is to be adjudged valid or invalid according to the fact whether it is made the means for raising the price of a commodity beyond its normal and reasonable value, then it would be difficult to sustain this conviction, for it affirmatively appears that the price fixed for coal by the exchange did not exceed what would afford a reasonable profit to the dealers. It was said by PARKER, C. J., (Lord Maccelesfield,) in his celebrated judgment in *Mitchel v. Reynolds*, 1 P. Wms. 181, which was the case of a bond taken from the defendant on the sale by him to the plaintiff of the lease of a bake house, claimed to be void as in restraint of trade: "In all restraints of trade, where nothing more appears, the law presumes them bad. But if the circumstances are set forth that presumption is excluded, and the court is to judge of these circumstances, and to determine accordingly; and if, upon them, it appears to be a just and honest contract, it ought to be maintained." If this agreement, and what was done under it, is to be judged as an isolated transaction, and its rightfulness is to be determined alone upon the particular circumstances, whether it did or did not produce an injury to trade, we might well hesitate. The obtaining by dealers of a fair and reasonable price for what they sell does not seem to contravene public policy, or to work an injury to individ-

uals. On the contrary, the general interests are promoted by activity in trade, which cannot permanently exist without reasonable encouragement to those engaged in it. Producers, consumers, and laborers are alike benefited by healthful conditions of business. But the question here does not turn on the point whether the agreement between the retail dealers in coal did, as matter of fact, result in injury to the public, or to the community in Lockport. The question is, was the agreement one, in view of what might have been done under it, and the fact that it was an agreement, the effect of which was to prevent competition among the coal dealers, upon which the law affixes the brand of condemnation, and which it will not permit? It has hitherto been an accepted maxim in political economy that "competition is the life of trade." The courts have acted upon and adopted this maxim in passing upon the validity of agreements, the design of which was to prevent competition in trade, and have held such agreements to be invalid. It is to be noticed that the organization of the "exchange" was of the most formal character. The articles bound all who became members to conform to the regulations. The observance of such regulations by the members was enforced by penalties and forfeitures. A member accused by the secretary of having violated any provision of the constitution or by-laws was required to purge himself by affidavit, although evidence to sustain the charge should be lacking. The shippers of coal were to be notified, in case of persistent default by the member, that "he is not entitled to the privileges of membership in the exchange." No member was permitted to sell coal at less than the price fixed by the exchange. The organization was a carefully-devised scheme to prevent competition in the price of coal among the retail dealers, and the moral and material power of the combination afforded a reasonable guaranty that others would not engage in the business in Lockport except in conformity with the rules of the exchange.

The cases of *Hooker v. Vandewater*, 4 Denio, 349, and *Stanton v. Allen*, 5 Denio, 434, are, we think, decisive authorities in support of the judgment in this case. They were cases of combinations between transportation lines on the canals to maintain rates for the carriage of goods and passengers, and

the court, in those cases, held that the agreements were void, on the ground that they were agreements to prevent competition; and the doctrine was affirmed that agreements having that purpose, made between independent lines of transportation, were, in law, agreements injurious to trade. In those cases it was not shown that the rates fixed were excessive. In the case in 5 Denio, the judge delivering the opinion referred to the effect of the agreement upon the public revenue from the canals. This was an added circumstance, tending to show the injury which might result from agreements to raise prices or prevent competition. See, also, *People v. Fisher*, 14 Wend. 10; *Arnot v. Coal Co.*, 68 N. Y. 558.

The gravamen of the offense of conspiracy is the combination. Agreements to prevent competition in trade are, in contemplation of law, injurious to trade, because they are liable to be injuriously used. The present case may be used as an illustration. The price of coal now fixed by the exchange may be reasonable, in view of the interests both of dealers and consumers, but the organization may not always be guided by the principle of absolute justice. There are some limitations in the constitution of the exchange, but these may be changed, and the price of coal may be unreasonably advanced. It is manifest that the exchange is acting in sympathy with the producers and shippers of coal. Some of the shippers were present when the plan of organization was considered, and it was indicated on the trial that the producers had a similar organization between themselves. If agreements and combinations to prevent competition in prices are, or may be, hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult, in any case, to establish the invalidity, although the moral evidence might be very convincing. We are of opinion that the principle upon which the case was submitted to the jury is sanctioned by the decisions in this state, and that the jury were properly instructed that, if the purpose of the agreement was to prevent competition in the price of coal between the retail dealers, it was illegal, and justified the conviction of the defendants.

There is a single remaining question. The trial judge was

requested by the defendants' counsel, in substance, to charge that the overt act required to be proved to sustain a conviction for conspiracy must be one which might injuriously affect the public, and that the act of the defendants in raising the price of coal was, of itself, not such an overt act as was required. The request was, we think, properly refused. The offense of conspiracy was complete at common law on proof of the unlawful agreement. It was not necessary to allege or prove any overt act in pursuance of the agreement. 3 Chit. Crim. Law, 1142; O'Connell v. Queen, 11 Clark & F. 155. In this state this rule of the common law was changed by the Revised Statutes; and, with certain exceptions, it was provided that no agreement should be deemed a conspiracy "unless some act beside such agreement be done to effect the object thereof by one or more of the parties to such agreement." 2 Rev. St. p. 692, § 10. And this principle was re-enacted in the Penal Code, § 171. The object of the statute was to require something more than a mere agreement to constitute a criminal conspiracy. There must be some act in pursuance thereof, and done to effect its object, before the crime was consummated. A mere agreement, followed by no act, is insufficient. The overt act charged in the indictment, and proved, was the raising of the price of coal. The raising of the price of coal by a dealer, unconnected with any conspiracy, is not unlawful; but if there is a conspiracy to regulate the price, and that conspiracy is unlawful, then raising the price is an act done to effect its object, whether the price fixed is reasonable or excessive. The object of the statute is accomplished when it is shown that the parties have proceeded to act upon the agreement, and done anything towards effecting its object. We think there is no error in the record, and the conviction should, therefore, be affirmed.

All concur.

Judgment affirmed.

PEOPLE OF THE STATE OF NEW YORK v. MILK
EXCHANGE, LTD.

(Court of Appeals of New York, 1895. 145 N. Y. 267.)

HAIGHT, J. This action was brought to have the defendant, a domestic corporation, dissolved, its charter vacated, and its corporate existence annulled. This relief is sought upon two grounds: First, nonuser; second, an unlawful and illegal combination and conspiracy, made in restraint of trade, to limit the supply of milk, and to fix and control the price thereof in the city of New York and elsewhere.

The defendant was organized on the 21st day of October, 1882, for the purpose, as stated in its certificate of incorporation, of "buying and selling of milk at wholesale and retail, the purchase of dairies of milk when deemed advisable, and the sale of the same to milk dealers." The complaint charges that the defendant was not engaged in this business. Upon the trial, at the close of the evidence, it was conceded by both counsel for the plaintiff and for the defendant that the question whether the defendant had been engaged in buying or selling milk, under the evidence, was a question of law for the court, and not for the jury. We so understand the evidence. There is no conflict, and we have but to ascertain the meaning and intention of the witnesses. The plaintiff's chief witness was Woodhull, the secretary and treasurer of the defendant. In his testimony he makes use of the expression that the exchange "has bought and sold milk"; but he then proceeds to state that he is familiar with the operations of the Milk Exchange in buying milk of the farmers, and selling it to dealers, and then states the manner in which the business was conducted. He says: "It is this: A farmer brings his dairy into the exchange to be sold. I go out and find him a dealer who can use the milk, and write the farmer how to mark his milk. I make the collection of the dealer, and pay it to the farmer, and we guaranty him the collection." He further testified that their commission was 3 per cent.; that the milk was never shipped to the exchange, but was shipped directly to the dealer; that they sold the milk for the farmer at the exchange price, which they guarantied to collect, and turn over to the farmer, less their commissions. Numerous witnesses speak of their arrange-

ment made, or attempted to be made, with the exchange for the sale of milk; and in each case it was distinctly stated that the exchange did not buy milk; that they merely looked up a dealer, who would purchase it at the exchange price; and that they guarantied the collection for 3 per cent. commission.

We think, therefore, that there can be no question as to the meaning of the witness Woodhull as to the expression made use of by him above referred to, for he immediately proceeded to explain how the milk was purchased and sold; and this evidence establishes the fact that the milk was not purchased by the exchange, but that it was sold in the manner described for the commission stated. The transactions, therefore, constituted a commission business, and were not, strictly speaking, the "buying and selling of milk at wholesale and retail." Whether the engaging in a commission business, such as we have described, is authorized by the defendant's charter, we do not deem it necessary now to determine. It may be that the commission business is so closely allied to that of buying and selling as to make the former legitimate and permissible under the defendant's certificate of incorporation.

We are thus brought to a consideration of the charge of unlawful conspiracy in restraint of trade. We have only called attention to the charge of nonuser for the purpose of showing the precise nature of the business conducted by the defendant as bearing upon the latter question. If the defendant was the purchaser of milk, or of dairies of milk, it had the right to fix the price from time to time that it would pay therefor. If, however, it was engaged only in the selling of milk upon commission, then its duty as a commission merchant, as ordinarily understood, was to get as high a price for the seller as could be reasonably obtained, and it was no part of its duty to otherwise fix the price of milk.

It appears that the Milk Exchange, when organized, or shortly thereafter, had 90-odd stockholders, a large majority of whom were milk dealers in the city of New York, or creamery or milk commission men doing business in that vicinity; that at the first meeting of the exchange after its incorporation, the following, among other by-laws, was adopted: "The board of directors shall have the power to make and fix the standard or market price at which milk shall be purchased by the stock-

holders of this company, and to declare the stock of any and every stockholder herein who purchases milk at any other than the price so named by the board forfeited, subject to the conditions set forth in article 3, sections 4 and 5, of these by-laws. All stock so forfeited by said board of directors shall be subject to the order of the board of directors, and shall be disposed of as they direct." This by-law remained in force for a number of years, and until after there was an investigation as to the character and nature of the defendant's business, and a report made by a committee of the senate. The by-law was then amended by striking out that part thereof which authorized the forfeiture of the stock of a stockholder who purchased milk at another price than that fixed by the exchange. It was again amended in April, 1890, but that part thereof which provided that the board of directors shall have the power to determine and fix, from time to time, the exchange price of milk, was retained. Acting upon these by-laws, the defendant's board of directors have, from time to time, during its corporate existence, fixed the price of milk to be paid by dealers, and the prices so fixed have largely controlled the market in and about the city of New York and of the milk-producing territory contiguous thereto.

These facts are significant, and we are unable to escape the conviction that there was a combination on the part of the milk dealers and creamery men in and about the city of New York to fix and control the price that they should pay for milk. Was this lawful?

In *Judd v. Harrington*, 139 N. Y. 105, certain parties, who were dealers in sheep and lambs, entered into an agreement, by its terms organizing an association for the declared purpose of guarding and protecting their business interests from loss by unreasonable competition. The agreement was to pool their commissions, except such as should be agreed to be paid to a butchers' association, with which they had agreed only to sell to the butchers, and the butchers to buy only of the dealers belonging to their respective associations. It was held that the real nature and purpose of the agreement was to suppress competition in an article of food, and to so control the market that they could enhance the price of the article.

In *People v. Sheldon*, 139 N. Y. 251, certain coal dealers

organized a company known as the Lockport Coal Exchange. The object of the organization was to prevent competition in the price of coal among the retail dealers in that city by constituting the exchange the sole authority to fix the price which should be charged by the members for coal sold by them. Sheldon and others, members of the exchange, were indicted, charged with the offense of doing an act injurious to trade or commerce. The trial judge submitted the case to the jury upon the theory that, if the defendants entered into the organization for the purpose of controlling the price of coal and managing the business of the sale thereof, so as to prevent competition in the price between the members of the exchange, the agreement was illegal. The jury found the defendants guilty. It was held that the principle upon which the case was submitted to the jury was sanctioned by the authorities. ANDREWS, C. J., in delivering the opinion of the court, said: "The question is, was the agreement, in view of what might have been done under it, and the fact that it was an agreement the effect of which was to prevent competition among the coal dealers, one upon which the law fixes the brand of condemnation? It has hitherto been an accepted maxim in political economy that 'competition is the life of trade.' The courts have acted upon and adopted this maxim in passing upon the validity of agreements, the design of which was to prevent competition in trade, and have held such agreements to be invalid." Again, he says: "Agreements to prevent competition in trade are, in contemplation of law, injurious to trade, because they are liable to be injuriously used. The present case may be used as an illustration. The price of coal now fixed by the exchange may be reasonable in view of the interests, both of dealers and consumers, but the organization may not always be guided by the principle of absolute justice. * * * If agreements and combinations to prevent competition in prices are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult in any case to establish the invalidity, although the moral evidence might be very convincing."

In *Arnot v. Coal Co.*, 68 N. Y. 558, the Butler Colliery Company and the Pittston & Elmira Coal Company were corpora-

tions engaged in mining and selling coal. For the purpose of monopolizing the trade and maintaining a high price for coal, the two companies entered into a contract, by which one agreed to take all of the coal which the other should desire to send north of the state line at the regular market price, and agreed not to sell coal to any other party to be shipped in that direction. It was held that the agreement was entered into for the purpose of enhancing the price of coal north of the state line, and that it was against public policy, and void. *RAPALLO, J.*, in the opinion, says: "That a combination to effect such a purpose is inimical to the interests of the public, and that all contracts designed to effect such an end are contrary to public policy, and therefore illegal, is too well settled by adjudicated cases to be questioned at this day." See *People v. Fisher*, 14 Wend. 9; *Hooker v. Vanderwater*, 4 Denio, 349; *Stanton v. Allen*, 5 Denio, 434; *Bank v. King*, 44 N. Y. 87; *Leonard v. Poole*, 114 N. Y. 371.

Applying the rule thus established to the evidence under consideration, it appears to us that a case is presented in which the jury might have found that the combination alluded to was inimical to trade and commerce, and, therefore, unlawful.

It may be claimed that the purpose of the combination was to reduce the price of milk, and that, it being an article of food, such reduction was not against public policy. But the price was fixed for the benefit of the dealers, and not the consumers, and the logical effect upon the trade of so fixing the price by the combination was to paralyze the production and limit the supply, and thus leave the dealers in a position to control the market, and, at their option, to enhance the price to be paid by the consumers. This brings the case within the condemnation of the authorities to which we have referred:

It is asserted that this litigation was instituted upon the petition of members of the Milk-Producers' Union, and that the purpose of that association was to enhance the price of milk. This may be, but the action was brought by the attorney general, and the influences that operated upon him to induce his prosecution of the defendant are now unimportant. The questions for our determination are presented by the pleadings, and the parties have the right to have them determined upon the merits. If the Milk-Producers' Union is engaged in an

unlawful business, which is a restraint upon trade and commerce, it may be dealt with in another action.

The order appealed from should be affirmed, and judgment absolute ordered in favor of the plaintiff upon the stipulation, with costs.

All concur (ANDREWS, C. J., and BARTLETT, J., on the ground of nonuser), except PECKHAM, J., who dissents upon the ground that there was proof sufficient of user, and that the action of the defendant did not fairly tend to enhance the price of milk to the consumer.

*Order affirmed, and judgment accordingly.*⁸⁷

CUMMINGS v. UNION BLUE STONE CO.

(Court of Appeals of New York, 1900. 164 N. Y. 401.)

LANDON, J. The trial court, in directing a verdict for the defendants, held that the contract for the alleged violation of which by the defendants the plaintiff sought to recover damages was a combination to control the market of bluestone and the market price, and to increase the market price, and maintain it at the increased price, and was, therefore, void.

The evidence was to the effect that in 1887 the plaintiff and 14 other persons were the producers of nearly the whole product of Hudson river bluestone, and of at least 90 per centum of the whole amount of such stone sold in the New York market to customers in various states east of the Mississippi river; that their yearly sales amounted to upwards of \$1,500,000; that, owing to competition among themselves, their profits had for some time been practically nominal; that, with the intent to increase their profits, and to secure to each of said producers such part of the sales as his usual production bore to the whole production, they entered into an agreement bearing date the 21st day of February, 1887, with the defendant the Union Blue Stone Company, and thereby agreed that the said company should act as their sales agent of all the marketable

⁸⁷—See also *Ford v. Chicago Milk Shippers' Assn.*, 155 Ill. 166.

bluestone, manufactured and unmanufactured, which the market would take for the six years from that date at prices to be fixed by the Bluestone Association, composed of the said producers, and to apportion the sales among the producers according to a schedule set forth in the contract, and to sell for no other parties, the producers agreeing to sell no stone except through such agent, and, acting as the Bluestone Association, to fix the prices, and each to furnish, upon the request of the sales agent, his quota of stone as apportioned. This contract was observed by the parties for about three years. The prices were increased, the sales aggregated about \$1,500,000 per year, and the plaintiff's share of the profits was satisfactory to him. By the end of three years, competition in other kinds of stone and in artificial stone had so far developed as to threaten, in the opinion of the greater part of the producers, not including the plaintiff, further successful operation under the contract, and they resolved to discontinue operations under it, with the result to the plaintiff that he took no further benefit under it. The plaintiff meantime had assigned his interest under the contract and certain bluestone and other property to the defendants Sweeney in consideration of their payment to him of 10 per centum of their gross amount of sales under the contract. The plaintiff charges that the bluestone company and his assignees, the Sweeneys, combined together to prevent any further delivery and sales upon his account under the contract, and thus deprived him of any further profit.

The plaintiff urges that it was a question of fact for the jury, and not of law for the court, whether the contract was simply to secure reasonable prices, or to extort from the public unreasonable prices. It may be conceded that one of its purposes was to enable the parties to obtain reasonable prices, but it gave them the power to fix arbitrary and unreasonable prices. The scope of the contract, and not the possible self-restraint of the parties to it, is the test of its validity. They could raise prices to what they supposed the market would bear; and as they expected to supply nearly the entire demand of the market, the temptation to extortion was unusually great.

The plaintiff cites the cases which permit the vendor to sell his business with or without his plant, and to agree with his vendee that he will not by competition or other acts, do any-

thing to injure what he sells. *Match Co. v. Roeber*, 106 N. Y. 473; *Leslie v. Lorillard*, 110 N. Y. 519, 1 L. R. A. 456; *Tode v. Gross*, 127 N. Y. 480, 13 L. R. A. 652; *Hodge v. Sloan*, 107 N. Y. 244. It may be conceded that the law, as now understood, restrains no one from selling his property, nor does it compel any one to continue a business which he can sell, or finds it to his interest to abandon, much less to continue it for any time, or in any particular manner or place. However it may have been when trade was small, money scarce, opportunities and markets few, at present the public has little to fear from any individual renouncing his calling and business in favor of another, and seeking a new field of activity. Contracts between individuals to that effect are not in general restraint of trade. But the case before us is of a different kind. It is one of such a combination among many dealers as threatened a monopoly, with which the individual would be practically powerless to compete, and the many consumers who would be severally exposed and coerced would be either compelled to submit to its exactions, or to forego the purchase of the commodity of customary use needful to them, and, but for this monopoly, obtainable in the market at a reasonable price. The same evil principle pervades both large and small combinations. All are alike offenders, differing in degree, but not in kind. And hence it is that contracts by which the parties to them combine for the purpose of creating a monopoly in restraint of trade, to prevent competition, to control and thus to limit production, to increase prices and maintain them, are contrary to sound public policy, and are void. *People v. Sheldon*, 139 N. Y. 251, 23 L. R. A. 221; *People v. Milk Exchange*, 145 N. Y. 267, 27 L. R. A. 437; *Judd v. Harrington*, 139 N. Y. 105; *Leonard v. Poole*, 114 N. Y. 371, 4 L. R. A. 728; *Arnot v. Coal Co.*, 68 N. Y. 558; *Stanton v. Allen*, 5 Denio, 434; *Hooker v. Vandewater*, 4 Denio, 349; *People v. Fisher*, 14 Wend. 9.

It is urged that the rule is only applicable to articles of prime necessity. Cases of criminal conspiracies to commit any act "injurious to trade or commerce" (Pen. Code, § 168; 2 Rev. St. p. 692, § 8, subd. 6) have been more frequent in commodities of prime necessity, such as grain, meat, salt, milk, coal, and the like, probably because such offenses are more flagrant, and were punishable at the common law. We are not now review-

ing a conviction for crime, and need not inquire whether, in any criminal element, the case differs from *People v. Sheldon*, supra. The subject-matter of the contract before us is a useful commodity of a nature to be needful for many purposes. Without considering the question whether there are many articles of commerce which are in no proper sense necessities, or even conveniences, but mere luxuries, or appendages of vanity, a monopoly in which does not conflict with the spirit of any statute, or with the sound public policy which the statute cited declares, it is clear that the bluestone in question is not within any of such classes. It is abundant in the foothills of the Catskill Mountains, and not found of equal quality elsewhere. When this contract was made there were many small producers who supplied it to these parties, but were themselves without means or facilities to reach the New York market. The stone had been for many years, and still is, in use for sidewalks, crossings, curbing, and gutters in the Eastern and Southern cities of the United States, and in the construction of bridges, fountains, basins, floors, and for trimmings in the exterior walls of buildings, and for various other purposes. Its fitness and serviceability for these purposes were shown, and the evidence also tended to show that in these respects it had no superior in the New York market. In a civil action prime necessity need not be shown. The parties to this contract controlled 90 per centum of a total product of about \$2,000,000 in value, marketed in New York City. Other kinds of stone were in competition with it, but it is plain that the customer who preferred this stone would be restricted in his reasonable rights if constrained by a monopoly to pay an exorbitant price for it, or to accept another kind which he did not want.

The uncontradicted evidence left it clear that this contract was void for the reasons stated, and the trial court was right in so holding as a matter of law. The trial court was also right in holding that the plaintiff had made no proof of his special charge against these defendants of a fraudulent breach of the contract as to his alleged interest in it. The judgments should be affirmed, with separate bills of costs.

GRAY, O'BRIEN, HAIGHT, and WERNER, JJ., concur. PARKER, C. J., and CULLEN, J., not sitting.

Judgment affirmed.

EMERY v. OHIO CANDLE CO.

(Supreme Court of Ohio, 1890. 47 Oh. St. 320.)

Error to superior court of Cincinnati.

In 1880 an unincorporated company was formed, to continue six years, called the "Candle Manufacturers' Association," which included the manufacturers of 95 per cent. of the star candles in that part of the United States lying east of the 114th deg. of longitude west of Greenwich, or substantially all the territory east of the western boundary of Utah. Its object was to increase the price and decrease the manufacture of candles in the territory covered by the agreement; and it is found, as a fact, to have had that effect during the whole existence of the association. The members composing the association were required to pay into its treasury two and one-half cents per pound on every pound of candles disposed of on their own account within the territory. But neither was bound to operate his factory; and, whether he did or did not, he received at stated times his proportion of the profits of the pool, which was based upon the business that had been done by him in previous years; thus making it to the interest of each member to operate his factory when the price of candles was high, and to remain idle when the price was low. The receipts of the association were placed in a selected depository, the First National Bank of Cincinnati, to the credit of an executive committee, consisting of three members, selected by the association, and could only be paid out on a check signed by at least two of them. The claims of all members were adjusted by this committee. The Ohio Candle Company, incorporated under the laws of this state, joined the association in 1883, and withdrew therefrom in March, 1884. During the month of January of that year it had paid into the association \$22.40, but there was due to it, under the terms of the agreement, as profits for that month, the sum of \$2,151.17. The committee agreed to pay the company the sum it had paid in, but refused to pay the sum due as profits, on the ground that, by withdrawing before the expiration of the life of the association, it had violated the agreement, and was entitled to none of its gains. Thereupon the company brought suit for the amount against the members composing the committee, to which the bank was made a party,

asking that the bank be ordered to pay the money to the plaintiff, or that a judgment be rendered in its favor for the amount with interest. Issues of fact having been made up, the case was tried to the court, and reserved for hearing in general term, which made a finding of facts,—the substance of which has been stated,—and rendered judgment against the members of the committee, which is sought to be reversed on the ground that it is against the law.

By the COURT. We are of the opinion that the suit cannot be maintained, for the reason that the objects of the association were contrary to public policy, and in no way to be aided by the courts. No recovery can be had except by giving effect to the terms of the agreement. The action is, in substance, a suit against the association to recover a sum due the plaintiff under the terms on which the association was formed. The committee represent the association, and a judgment against them is a judgment against it. If, as claimed by the defendants, a member could not withdraw from the association until the six years had expired, then the committee, as representing the association, had a defense on which they might have relied, had the objects of the association been perfectly legitimate. But should a court be called on to consider any defense, so long as the claim itself is based upon an agreement to which it can give no countenance? It must be observed that the withdrawal of the plaintiff was not at a time, nor under circumstances, that could give to it the merits of repentance. It had passed beyond where it might, by withdrawal, have secured the aid of a court in recovering what it had advanced in furtherance of an illegal object. Its suit is to recover its portion of the ill gotten gains. The case of *Norton v. Blinn*, 39 Ohio St. 145, can have no application here, for this is a suit between parties to enforce the terms of the illegal agreement. See *Texas & P. Ry. Co. v. Southern Pac. Ry. Co.*, 6 South. Rep. 888, where *Brooks v. Martin*, 2 Wall. 70, is accurately distinguished, and shown to have no application to a case such as this.

*Judgment reversed, and petition of plaintiff below dismissed.*⁸⁸

88—See *India Bagging Assn. v. Kock & Co.*, 14 La. Ann. 164 (where an agreement not to sell at all for three months without the consent of a majority was illegal).

JUDD v. HARRINGTON

(Court of Appeals of New York, 1893. 139 N. Y. 105.)⁸⁹

O'BRIEN, J. The plaintiff, as treasurer, of an association called the New York & New Jersey Sheep Brokers' Association, sued to recover \$10,000, stipulated as liquidated damages in a contract entered into between the association and the defendant. He was defeated in the action, and one of the questions presented is whether the contract is of such a character as to entitle the plaintiff to invoke the aid of the court for its enforcement.

The contract was executed, as appears from its date, on the 11th of April, 1887, and was to be operative from the 1st of January preceeding. The parties who signed the agreement were brokers and dealers in sheep and lambs consigned to market in New York and vicinity.

The paper recites that the persons signing the same, of whom the defendant was one, had associated themselves together for the purpose of guarding and protecting their business interests from loss by unreasonable competition, and that they had agreed to pool and make a common fund of all commissions earned in the sale of sheep and lambs, excepting such as it was agreed should be paid to the Sheep & Lamb Butchers' Benefit Association of the City of New York. All the members of the association thus formed by the agreement then proceeded to enter into various stipulations with each other. Those that are material to the question involved are as follows:

(1) That all members of the association thus formed, and every one subsequently admitted, should keep a just and true account of the number of sheep and lambs sold by them or their firms, by correct entries to be made in a book to be kept for that purpose; that at the close of each week, or within two days thereafter, a written statement from the books was to be made by each member to the treasurer, showing the full amount of sheep and lambs sold during the week, which statement the treasurer was to enter in a book to be kept by him, and at the same time file the statement for reference.

(2) At the close of each month a settlement between the

89—Only the opinion of the court is given.

members was to be made, and the treasurer was to ascertain the total number of sheep and lambs sold, and the total sold by each member, and make a statement of the same, a copy of which, within two days thereafter, was to be delivered to each member, who was, within three days thereafter, to pay to the treasurer eleven and three-fourths cents per head for each and every sheep and lamb sold by him or his firm during the month, as appeared from the treasurer's statement. Then the treasurer was to distribute the fund between the members according to the percentage of the whole fixed by the agreement.

(3) All moneys which the treasurer was to receive from the butchers' association above mentioned were to be divided between the members in the same way.

(4) For a violation of this agreement, each member is to pay the treasurer \$10,000, to be divided between the members in the same way. It is alleged that the defendant carried out the agreement on his part until about February 1, 1889, when he refused to abide by it, and from that date wholly failed and refused to render to the treasurer the account and statement provided for in the agreement.

On the 26th of December, 1886, the brokers' association, formed as above described, and represented in this action by the plaintiff, and the butchers' association above mentioned, and referred to in the agreement, entered into a mutual agreement with each other, to take effect at the same date as the one above described, to wit, January 1, 1887. This agreement recited that the brokers were engaged in selling, and the butchers in buying, sheep and lambs for slaughter, and that it was for the interest of both that they should be closely connected in business, and should mutually aid and protect each other as thereafter set forth. The brokers bound themselves to keep correct books of account, showing the number of sheep and lambs sold by them on the market, and at the close of every month to render a full and true statement of all such sales to the secretary of the butchers' association, and at the same time pay to said secretary three and one-fourth cents per head for each and every sheep and lamb sold. The brokers further agreed:

(1) Not at any time during the term of the agreement to

engage in, or be directly or indirectly engaged in, slaughtering sheep or lambs, except for export.

(2) Not to sell any sheep or lambs to any one else except the members of the butchers' association, and if they did they were bound to pay the treasurer of the last-named association 15 cents per head for the same. Any sales so made were to be reported every week, and payment made on account thereof.

The butchers agreed to report to the brokers the names of all members of the association, including new members to be added from time to time; that they would buy sheep and lambs from the brokers only, and, if from any other parties, they would pay over to the brokers, on account thereof, fifteen cents per head, which purchases were to be reported to the brokers every week.

These two papers must be read together, and, thus considered, they manifestly were intended for the purpose of creating a combination between the butchers engaged in buying, and the brokers engaged in selling, sheep and lambs, in order to control the market, fix the price, and destroy competition. The brokers were to sell only to the butchers, and the butchers to buy only from the brokers. The owners of sheep, or the drovers or consignees who had them for sale, and the public who were interested in the price of meat, as an article of food, might have been prejudiced by the agreement. Whether they were, in fact, is not material.

The real purpose and intent of the agreement were to suppress competition in an article of food, and, as such agreements tend to enhance the price, they are regarded as detrimental to the public interest, and forbidden by public policy. That such agreements are illegal and void has been settled by the decisions of the courts from the earliest times: These authorities are to be found in the learned opinion below, and upon the briefs of counsel in this court; but I do not consider it necessary to refer to them further, or to discuss the question at length, for the reason that at this very term of the court the whole question has been examined, elaborately discussed, and decided in another case. *People v. Sheldon*, (Oct., 1893,) 34 N. E. Rep. 785; *Id.*, 66 Hun, 590. Courts will not aid parties seeking to enforce such an agreement, (*Leonard v. Poole*, 114 N. Y. 371,) irrespective of the question

whether, in fact, it produced the evil results to which it tended, or was harmless. It is said that the purpose was to facilitate the transaction of business, and save useless expense. It is quite likely that the agreement did enable the parties to transact their business with less labor and expense, and that may be said of nearly all such combinations, but that circumstance cannot save them from condemnation, when they tend to prejudice the public. The illegal character of the agreement appeared upon its face, and was a necessary legal conclusion from its provisions. It was doubtless the duty of the court to dispose of the case as presenting a question of law, but the illegal intent and purpose having been found by the jury, when the court was bound to declare it, the plaintiff is not injured by the ruling at the trial submitting the case to the jury on the question of the purpose and intent of the agreement. The right of the plaintiff to recover when no actual damages have been alleged or proven, and some other questions, are involved in the case, but it is unnecessary to consider them, as the illegal nature of the agreement sued upon is a fundamental objection to a recovery.

The judgment should be affirmed, with costs.

All concur; GRAY, J., in result.

Judgment affirmed.

GIBBS v. CONSOLIDATED GAS CO. OF BALTIMORE

(Supreme Court of United States, 1889. 130 U. S. 396.)

In Error to the Circuit Court of the United States for the District of Maryland.

Plaintiff in error brought this action in the circuit court of the United States for the district of Maryland against the defendant in error, "a corporation duly incorporated under the laws of Maryland, for money payable by the defendant to the plaintiff," as stated in the "bill of particulars of plaintiff's claim," "for services rendered by me at your request in negotiating and consummating an arrangement and settlement of differences between the Consolidated Gas Co. of Balto. City and the Equitable Gas-Light Co. of Balto. City, between

July 1, 1884, and November 1, 1884, \$50,000;" and a trial was had upon the general issue pleaded, resulting in verdict and judgment for the defendant, May 14, 1885. From the bill of exceptions it appears that—

"At the trial of this case, the incorporation of the defendant being admitted, the plaintiff, to maintain the issues upon his part joined, gave in evidence the agreement following between said defendant and the Equitable Gas-Light Company of Baltimore City, a Maryland corporation,—that is to say:

"*Agreement.* This agreement, made this seventh day of October, eighteen hundred and eighty-four, between the Equitable Gas-Light Company of Baltimore City, a corporation duly organized under the laws of the state of Maryland, party of the first part, and the Consolidated Gas Company of Baltimore City, a corporation duly organized under the laws of the same state, party of the second part. Whereas, the parties hereto conduct the business of making and selling gas in the city of Baltimore, Maryland, and for some time past have been drawn into active competition, resulting in a loss of profits to each company, as well as large expenses and great annoyance; and whereas, each party hereto desires to enter into an arrangement with the other, whereby the business of each may be conducted in a more profitable manner than at present: Now, therefore, in consideration of the premises, and of the mutuality hereof, it is hereby agreed between said parties as follows, viz.:

"1. Gas shall be sold by each company at a rate of one dollar and seventy-five cents per thousand cubic feet, with a rebate of fifteen cents a thousand feet to consumers for payment within seven days from date of rendering bill, unless the rate shall be changed by mutual agreement of the parties hereto in writing; but, in view of the much larger interest of the party of the second part in the subject-matter of this contract, it is agreed that in case of competition on the part of any other gas company the said party of the second part shall have the right at its discretion to reduce the rate at which gas shall be sold by either or both of the parties hereto, and shall have the right at its discretion to fix and change said price at which gas shall be sold by either or both of the parties hereto, from time to time, so long as such competition shall continue:

provided, that said price shall not be placed at less than one dollar (\$1.00) per thousand feet without the mutual consent of the parties hereto in writing. The introduction of gas from the street main to the inside of the building to be lighted will in all cases be done by the companies, for which the proprietor of the building or the person applying for the supply of gas will be required to pay in advance the sum of eight dollars, (\$8.00) to cover the expenses of tapping main, laying service pipe, setting meter, and its connection to the building line. An extra charge will be made where the building is set back from the building line.

“ ‘2. Each party hereto shall deduct from its receipts and retain the sum of one dollar for every thousand feet of gas sold by it as a basis of cost to cover all expenses of the business of each.

“ ‘3. All extensions of mains, including services and meters on said extensions, and all enlargement of the capacity of the works necessary to do the increasing business during the continuance of this agreement, shall be made by the Consolidated Gas Company of Baltimore City, at its own cost and expense, whose property such enlargements and extensions shall be, the Equitable Company only being required to provide the meters and services necessary to supply such additional consumers as may be furnished by it under section 5, below.

“ ‘4. Division of receipts shall be made as follows, viz.:

“ ‘(1) All receipts (over and above the sum of one dollar per thousand feet, allowed as a basis of cost) from gas sold each year upon sales not exceeding the total quantity of gas sold by both of said companies during the year ending October first, eighteen hundred and eighty-four, shall be divided between the parties hereto in the following proportions, viz.: The party of the first part shall receive such a proportion of the same as the amount of gas sold by it during the year ending October first, eighteen hundred and eighty-four, shall bear to the total quantity of gas sold by both of the parties hereto during that period, provided the quantity sold by the party hereto of the first part during said period shall not exceed two hundred and thirteen millions of feet, (213,000,000,) and the party of the second part shall receive all the balance, after deducting the amount to which the party of the first part shall

be entitled, as above provided, it being expressly understood and agreed that the basis of participation in said receipts shall be the proportion which the quantity of gas sold by each party from October first, eighteen hundred and eighty-three, to October first, eighteen hundred and eighty-four, bears to the total quantity of gas sold by both parties hereto, and that neither party hereto shall receive more thereof than by such a basis of division it would be entitled to, subject, however, to the foregoing provision that the quantity sold by the party of the first part during the said year ending October first, eighteen hundred and eighty-four, shall not be considered as exceeding two hundred and thirteen millions (213,000,000) of feet as aforesaid.

“(2) All receipts (over and above the said allowance of one dollar per thousand feet as a basis of costs) from gas sold each year upon sales in excess of the said total quantity sold during the year ending October first, eighteen hundred and eighty-four, shall be divided as follows, viz.: The party of the first part shall receive thereout a percentage equal to one-half of the percentage which it will receive as above, and the party of the second part shall receive all the balance of such receipts from said increased sales.

“5. Neither party hereto shall solicit any business belonging to the other, but either party may take such consumers of the other as may voluntarily, without any solicitation, desire to change from one to the other.

“6. All the accounts between the parties hereto hereunder shall be adjusted quarterly on the tenth days of February, May, August, and November of each year for the quarter ending on the last day of December, March, June, and September, and settlements of all balances shall be made within ten days thereafter. The said adjustment of accounts shall be made by an auditor, who shall be chosen by the agreement of both parties hereto.

“7. If any differences or misunderstanding arise hereunder, the matter in dispute shall be referred for decision to three arbiters, whose decision shall be binding upon the parties hereto, so far as in law it may have binding force and effect. Said arbiters shall be chosen as follows, viz.: One shall be chosen by each party hereto, and the third by the two so

chosen: provided, that, if either party hereto neglects or refuses for ten days after request, in writing, mailed or personally delivered, to appoint an arbiter, the party making such request shall appoint two arbiters, who shall appoint a third, as above provided.

“ ‘8. It is further understood and agreed that if either party hereto shall at any time willfully fail, omit, or neglect to perform, or shall violate any of the covenants herein contained, such party shall be liable to the other for all loss and damage caused to or suffered by it thereby, and that the damages which shall be caused thereby will be equal to the sum of two hundred and fifty thousand dollars, (\$250,000,) and that the party who shall so fail, neglect, or omit to perform, or who shall violate any of the covenants herein contained, shall at once thereupon pay to the other party the sum of two hundred and fifty thousand dollars as liquidated damages, and that upon failure to pay the same upon demand suit may be brought therefor, in which the damages so caused or suffered shall be assessed at said sum of two hundred and fifty thousand dollars.

“ ‘9. This agreement shall take effect from October fifteenth, eighteen hundred and eighty-four, and shall continue in force for thirty years from its date.’

“ [Duly signed and sealed October 7th, 1884.]

“The plaintiff then proved the incorporation of the United Gas Improvement Company, a corporation incorporated by and doing business in the state of Pennsylvania. The plaintiff further proved that at the time of the agreement aforesaid he was the general manager of the said United Gas Improvement Company, and the business of the said corporation was the owning, improving, leasing, and manipulation of gas property throughout the country; said company being the owner of many gas-works in various parts of the Union, and constantly in negotiation for the sale and purchase of that kind of property. He further proved that, by reason of the rivalry in the city of Baltimore between the defendant and the Equitable Gas-Light Company aforesaid, the price of gas had been reduced to a figure below that at which it could be profitably manufactured, and that the company of which the plaintiff was manager, as well as other gas companies throughout the

country, had been materially inconvenienced by the fact that they were required and expected by their customers to sell their gas at the insufficient price at which it was furnished in Baltimore. It became, therefore, the interest of the plaintiff and his company that the conflict in Baltimore should, if possible, be brought to an amicable termination, and the plaintiff made a suggestion to that effect to the president of the Equitable Gas-Light Company, and in consequence thereof was employed by that company to bring about a settlement, if possible, with the defendant. For this purpose the plaintiff visited Baltimore, and opened negotiations with the defendant, which were carried on for some time by proposition and counter-proposition, and resulted, finally, in the agreement heretofore inserted in this bill of exceptions.

"The plaintiff gave further evidence tending to show that early in those negotiations he informed the defendant, through the committee representing it, that he was employed and would be paid by the Equitable Gas-Light Company if he made an arrangement satisfactory to that company, and that if he should be successful in bringing about a settlement satisfactory to the defendant also, he should expect and claim to be compensated by the defendant likewise. Further testimony in respect to the matter of his said negotiations and services and his claimed and expected compensation from the defendant was given by the plaintiff tending to support and establish the hypotheses of fact set up by the plaintiff in those regards in his prayers, hereinafter to be inserted.

"The defendant then, to maintain the issues upon its part joined, gave in evidence the acts of the general assembly of Maryland of 1867, c. 132, and of 1882, c. 337, both relating to the Equitable Gas-Light Company of Baltimore City, which it was agreed might be read in evidence, if necessary, from the statute-book, on the hearing in error. The defendant further gave evidence tending to contradict the evidence on the part of the plaintiff in regard to what occurred between the plaintiff and the defendant's committee in respect to the negotiations aforementioned, and to the plaintiff's alleged demand for compensation from the defendant, and tending to disprove the facts assumed as the hypotheses of the plaintiff's prayers; and the defendant further gave evidence tend-

ing to establish and maintain the hypotheses of fact set up by the defendant in its prayers to the court, hereinafter to be inserted."

Various instructions were asked on behalf of each of the parties, which the court declined to give, but at defendant's request instructed the jury "that the plaintiff, upon the pleadings and evidence in this case, is not entitled to recover, because the contract offered in evidence, and for the procuring of the making whereof he claims compensation in this suit, was illegal and void."

Mr. Chief Justice FULLER, after stating the facts as above, delivered the opinion of the court.

The plaintiff sought to recover compensation for services alleged to have been rendered by him to the defendant in securing the contract in question between the defendant and the Equitable Gas-Light Company of Baltimore. It is objected that the court erred in giving the instruction that the plaintiff was not entitled to recover, because it assumed a material fact in dispute, which should have been left to the jury, namely, that it was "for the procuring of the making" of the contract offered in evidence that compensation was claimed. The record does not show that this objection to the instruction was taken in the court below, nor does it contain any evidence tending to establish that the plaintiff claimed compensation for anything else than for services in bringing about the agreement. Plaintiff's bill of particulars is for services "in negotiating and consummating an arrangement and settlement of differences" between the two gas companies; and he put the contract in evidence, and adduced proof that he carried on negotiations, which "resulted finally" in the execution of it. He was general manager of a corporation engaged in the business of "the owning, improving, leasing, and manipulation of gas property throughout the country," and, as his company and other gas companies "had been materially inconvenienced by the fact that they were required and expected by their customers to sell their gas at the insufficient price at which it was furnished in Baltimore," he suggested "that the conflict in Baltimore should, if possible, be brought to an amicable termination," "and in consequence thereof" was

employed by the Equitable Gas-Light Company "to bring about a settlement, if possible, with the defendant." The conflict referred to seems to have been the competition in the making and vending of gas in the city of Baltimore, which it had been the object of the general assembly of Maryland to encourage; and the settlement to which he alludes was embodied in the contract in question, by which competition was to be destroyed, and the object of the general assembly defeated.

We do not feel called upon, under such circumstances, to reverse the judgment upon the ground that the court assumed in the instruction a matter of fact which should have been left to the jury to determine.

According to the evidence given by the plaintiff, he informed the defendant "that he was employed and would be paid by the Equitable Gas-Light Company, if he made an arrangement satisfactory to that company, and that, if he should be successful in bringing about a settlement satisfactory to the defendant also, he should expect and claim to be compensated by the defendant likewise."

Since he had thus entered upon the enterprise under a specific agreement with the Equitable Gas-Light Company, it is somewhat difficult to understand upon this record how, in carrying such an express contract out, he could impose the obligation on the defendant to pay him for doing so upon a mere notification that he should expect from it compensation for the services he had expressly agreed to render the other company, because the result might be satisfactory to the defendant,—a result necessarily to be assumed if any contract was arrived at. The defendant could not, in that view, be held to have laid by and accepted services which the plaintiff would otherwise not have been obliged to perform, nor could plaintiff assert that he did perform only upon the expectation of being also paid by the defendant. The hypotheses of fact set up by the plaintiff in the instructions he asked, and which were refused, contain nothing in respect of which testimony tending to support and establish such hypotheses would add to the mere fact of the notification of plaintiff's expectation, and the evidence on defendant's part tended to show a denial of any obligation to pay.

But, apart from this, the real question submitted to us for

decision is whether, even if there were no other objection to plaintiff's recovery, such recovery could be allowed in view of the nature of the alleged services.

In *Irwin v. Williar*, 110 U. S. 499, 510, 4 Sup. Ct. Rep. 160, it was held that where a contract, void on account of the illegal intent of the principal parties to it, had been negotiated by a person ignorant of such intent, and innocent of any violation of law, the latter might have a meritorious ground for the recovery of compensation for services and advances, but when such agent "is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction." It is clear from the evidence adduced by the plaintiff that he falls within the category last described; and he makes profit of the fact that the first suggestion in the line of manipulating the gas interests of Baltimore came from himself. Hence, if the contract he brought about was forbidden by statute, or by public policy, it is evident that he could not recover, and the judgment must be affirmed.

By this contract it is recited that active competition between the two companies had resulted in expense, annoyance, and loss of profits, and it was therefore provided that the price of gas to consumers should be placed at \$1.75 per thousand cubic feet, with a rebate of fifteen cents a thousand feet for payment within seven days, "unless the rate shall be changed by mutual agreement of the parties hereto in writing;" but, as the defendant had much the larger interest, it might, in case of competition on the part of any other gas company, reduce the rate at which gas should be sold "by either or both of the parties hereto, from time to time, so long as such competition shall continue," provided it should not be put at less than one dollar per thousand feet without the written consent of both parties; that the entire net receipts from the sale of gas should be pooled and divided between the companies in a fixed ratio, without regard to the amount of gas actually supplied by either; that one of the companies should lay no more pipes or mains for the supply of gas in the city; that all future pipes or mains should be laid by, and remain

the property of, the other company; and that either party which violated any of the covenants in the contract should pay to the other the sum of \$250,000 as liquidated damages. It will be perceived that this was an agreement for the abandonment by one of the companies of the discharge of its duties to the public, and that the price of gas as fixed thereby should not be changed, except that, in case of competition, the rate might be lowered by one, but not below a certain specified rate, without the consent of the other. And in the case in hand the Equitable Gas-Light Company was expressly forbidden to enter into such a contract. That company was incorporated by an act of the general assembly of Maryland, passed March 6, 1867, with a capital of \$2,000,000, which might be increased to \$3,000,000, and with authority to lay pipes along and under the streets, squares, lanes, and alleys of the city of Baltimore, and to supply with light any dwelling-house or other buildings or places whatever belonging to individuals or corporations, adjacent to any such street, square, lane or alley, and with "all the rights and privileges granted to the Gas-Light Company of Baltimore by the second, third, fourth, and fifth sections of the ordinance of the mayor and city council of Baltimore, entitled 'An ordinance to provide for more effectually lighting the streets, squares, lanes, and alleys of the city of Baltimore,' approved June 17, 1816, and the act of assembly of December session, 1816, c. 251, so far as the same are not inconsistent with the provisions of this act; and the said company hereby incorporated shall be liable to all the duties, restrictions, and penalties [provided] for in said sections of said ordinance and in said act of assembly." Laws Md. 1867, pp. 207, 211, 212.

Reference to the act and ordinance of 1816 (Laws Md. 1813-1817, c. 251, of 1816; Ordinances, Baltimore, 1813-1822, p. 95) does not contribute to the argument here save as indicating the design of the general assembly to give equal powers to a competing company. Said act of March 6, 1867, § 14, further provided that "the general assembly hereby reserves the right to alter, amend, or repeal this act at pleasure." Laws Md. 1867, pp. 207, 214.

On the 3d of May, 1882, an act supplementary to the act incorporating the Equitable Gas-Light Company of Baltimore

City was approved, (Laws Md. 1882, pp. 550, 551,) authorizing and empowering said company to manufacture and sell gas in Baltimore county as well as in Baltimore city, and to exercise all the powers and rights conferred upon it by the acts of assembly and any amendments thereto, including the right to lay all necessary and convenient pipes, etc., in the county as well as in the city, and the fourth section of this act was as follows:

"That the said company be, and hereby is, prohibited from entering into any consolidation, combination, or contract with any other gas company whatever; and any attempt to do so, or to make such combinations or contracts as herein prohibited, shall be utterly null and void."

In *Greenwood v. Freight Co.*, 105 U. S. 13, the right to repeal the charter of a street-railroad company was sustained under a provision of the General Statutes of Massachusetts declaring "every act of incorporation passed after the 11th day of March in the year 1831 shall be subject to amendment, alteration, or repeal at the pleasure of the legislature."

In *Close v. Cemetery*, 107 U. S. 466, 476, it was said that "a power reserved to the legislature to alter, amend, or repeal a charter authorizes it to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right."

Similar views were expressed in *Water-Works v. Schottler*, 110 U. S. 347; *County of Callaway v. Foster*, 93 U. S. 567; and other cases.

The consent of the corporation was not required to the operation of such a provision as that embodied in the fourth section of the act of 1882, but, if acceptance were necessary, the exercise of corporate action by this gas company after the passage of the amendment was sufficient evidence of such acceptance.

The supplying of illuminating gas is a business of a public nature to meet a public necessity. It is not a business like that of an ordinary corporation engaged in the manufacture of articles that may be furnished by individual effort. *Gas-Light Co. v. Manufacturing Co.*, 115 U. S. 650; *Gas Co. v.*

Gas-Light Co., 115 U. S. 683; *Shepard v. Gas-Light Co.*, 6 Wis. 539; *Coke Co. v. Coke Co.*, 121 Ill. 530; *St. Louis v. Gas-Light Co.*, 70 Mo. 69. Hence, while it is justly urged that those rules which say that a given contract is against public policy, should not be arbitrarily extended so as to interfere with the freedom of contract, (*Printing Co. v. Sampson*, L. R. 19 Eq. 462,) yet, in the instance of business of such character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy. This subject is much considered, and the authorities cited in *Transportation Co. v. Pipe Line Co.*, 22 W. Va. 600; *Coke Co. v. Coke Co.*, 121 Ill. 530; *Telegraph Co. v. Telegraph Co.*, 65 Ga. 160.

The decision in *Mitchel v. Reynolds*, 1 P. Wms. 181, 1 Smith, Lead. Cas. pt. 2, p. 508, is the foundation of the rule in relation to the invalidity of contracts in restraint of trade; but as it was made under a condition of things, and a state of society, different from those which now prevail, the rule laid down is not regarded as inflexible, and has been considerably modified. Public welfare is first considered, and, if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. The question is whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is or is not unreasonable. *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351; *Cloth Co. v. Lorisont*, L. R. 9 Eq. 345.

"Cases must be judged according to their circumstances," remarked Mr. Justice BRADLEY in *Navigation Co. v. Winsor*, 20 Wall. 64, 68, "and can only be rightly judged when the reason and grounds of the rule are carefully considered. There are two principal grounds on which the doctrine is founded that a contract in restraint of trade is void as against public policy. One is the injury to the public by being deprived of the restricted party's industry; the other is the injury to the party himself by being precluded from pursuing his occupation, and thus being prevented from supporting himself and his family. It is evident that both these evils occur when the

contract is general, not to pursue one's trade at all, or not to pursue it in the entire realm or country. The country suffers the loss in both cases; and the party is deprived of his occupation, or is obliged to expatriate himself in order to follow it. A contract that is open to such grave objection is clearly against public policy. But if neither of these evils ensue, and if the contract is founded on a valid consideration and a reasonable ground of benefit to the other party, it is free from objection and may be enforced." Innumerable cases, however, might be cited to sustain the proposition that combinations among those engaged in business impressed with a public or *quasi* public character, which are manifestly prejudicial to the public interest, cannot be upheld. The law "cannot recognize as valid any undertaking to do what fundamental doctrine or legal rule directly forbids. Nor can it give effect to any agreement the making whereof was an act violating law. So that, in short, all stipulations to overturn, or in evasion of, what the law has established; all promises interfering with the workings of the machinery of the government in any of its departments, or obstructing its officers in their official acts, or corrupting them; all detrimental to the public order and public good, in such manner and degree as the decisions of the courts have defined; all made to promote what a statute has declared to be wrong,—are void." Bish. Cont. § 549; *Iron Co. v. Extension Co.*, ante, 402, (decided at this term, opinion by Mr. Justice FIELD;) *Trist v. Child*, 21 Wall. 441; *Irwin v. Williar*, 110 U. S. 499; *Arnot v. Coal Co.*, 68 N. Y. 558; *Salt Co. v. Guthrie*, 35 Ohio St. 666; *Woodruff v. Berry*, 40 Ark. 261; *Railroad Co. v. Railroad Co.*, 3 Rob. (N. Y.) 411; *Craft v. McConoughy*, 79 Ill. 346; *Hooker v. Vandewater*, 4 Denio, 349; *Stanton v. Allen*, 5 Denio, 434; *Railroad Co. v. Collins*, 40 Ga. 582; *Coal Co. v. Coal Co.*, 68 Pa. St. 173.

It is also too well settled to admit of doubt that a corporation cannot disable itself by contract from performing the public duties which it has undertaken, and by agreement compel itself to make public accommodation or convenience subservient to its private interests.

"Where," says Mr. Justice MILLER, delivering the opinion of the court in *Thomas v. Railroad Co.*, 101 U. S. 71, 83, "a corporation, like a railroad company, has granted to it by

charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes without the consent of the state to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void as against public policy."

These gas companies entered the streets of Baltimore, under their charters, in the exercise of the equivalent of the power of eminent domain, and are to be held as having assumed an obligation to fulfill the public purposes to subserve which they were incorporated. At common law, corporations formed merely for the pecuniary benefit of their shareholders could, by a vote of the majority thereof, part with their property, and wind up their business; but corporations to which privileges are granted in order to enable them to accommodate the public, and in the proper discharge of whose duties the public are interested, do not come within the rule. But we are not concerned here with the question when, if ever, a corporation can cease to operate without forfeiture of its franchises, upon the excuse that it cannot go forward because of expense and want of remuneration. There is no evidence in this record of any such state of case, and, on the contrary, it appears that the cost of the manufacture of gas was largely below the price to be charged named in the stipulation between the parties. There is nothing upon which to rest the suggestion that the companies were unable to serve the consumers, while the record shows, on the other hand, that they simply desired to make larger profits on whatever gas they might furnish. Nor are we called upon to pass upon the validity, generally, of pooling agreements. Here the contract was directly in the teeth of the statute, which expressly forbade the Equitable Gas-Light Company from entering into it. That prohibition declared the policy of the state, as well as restrained the particular corporation.

The distinction between *malum in se* and *malum prohibitum* has long since been exploded, and as "there can be no civil right where there can be no legal remedy, and there can be

no legal remedy for that which is itself illegal," (Bank v. Owens, 2 Pet. 527, 539,) it is clear that contracts in direct violation of statutes expressly forbidding their execution cannot be enforced.

The question is not one involving want of authority to contract on account of irregularity of organization, or lack of an affirmative grant of power in the charter of a corporation, but a question of the absolute want of power to do that which is inhibited by statute, and, if attempted, is in positive terms declared "utterly null and void."

"The rule of law," said PARKER, C. J., in Russell v. De-Grand, 15 Mass. 35, 39, "is of universal operation, that none shall, by the aid of a court of justice, obtain the fruits of an unlawful bargain."

We cannot assist the plaintiff to get payment for efforts to accomplish what the law declared should not be done, and the judgment must be affirmed.⁹⁰

PEOPLE v. CHICAGO GAS TRUST CO.

(Supreme Court of Illinois, 1889. 130 Ill. 268.)

This is an information in the nature of a *quo warranto* filed by the Attorney General of the State in the Circuit Court of Cook County against The Chicago Gas Trust Company, summoning the latter to answer to the People of the State by what warrant it exercises certain powers, privileges and franchises therein described. The information sets out in full the charter of "The Chicago Gas Light and Coke Company," granted by the Legislature of Illinois in 1849, an Act amendatory of such charter passed in 1855, an Act to enable the Chicago Gas Light and Coke Company to increase its capital stock passed in 1869; also, the charter of the "People's Gas Light and Coke Company" granted in 1855, and an Act to amend the same passed in 1865; also, in substance, an ordinance passed by the common council of the City of Chicago

⁹⁰—See also Chicago Gas Light Co. v. People's Gas Light Co., 121 Ill. 530.

in 1858, authorizing the People's G. L. & C. Co. to lay its mains and pipes, etc., in the streets, etc., of said city; and the substance of an agreement made between the Chicago G. L. & C. Co. and the People's G. L. & C. Co. in April, 1862. Said charters and the Acts amendatory thereof, and said ordinance and agreement are more particularly described in *Chicago Gas Light Co. v. People's Gas Light Co.* 121 Ill. 530. The substance of the litigation between the Chicago Co. and the People's Co., and the result thereof, as passed upon and announced by this Court in the last named case, are also stated in the information.

The information further states that the Chicago G. L. & C. Co. received subscriptions to its capital stock to the amount of \$4,984,200.00 and issued certificates for 199,368 shares of such stock, each share for \$25.00; that the People's G. L. & C. Co. received subscriptions to its capital stock to the amount of \$4,000,000.00 and issued certificates for 40,000 shares of \$100 each; that the two companies laid their mains and pipes in the streets of Chicago, and operated their works and furnished gas to the city and its inhabitants, the former, after April, 1862, in the North and South Divisions, and the latter in the West Division, of the city.

The information also sets up that, in January, 1882, "The Consumers' Gas, Fuel and Light Company of Chicago, Ill.," was organized under the general Incorporation Act of 1872, and was authorized, by an ordinance of the common council of Chicago passed April 28, 1882, to construct and operate its works in that city and to lay its pipes and mains under the streets, etc., and proceeded to lay its pipes in the North and South Divisions, and to supply the inhabitants with gas; that, by reason of the foreclosure of a trust deed given by the last named company, its property, rights and franchises passed to and became vested in the "Consumers' Gas Company," a corporation organized, in November, 1886, under the general Incorporation Act.

The proceedings for the incorporation of the "Consumers' Gas Company" are set out in full, showing its capital stock to be \$5,000,000.00 divided into 50,000 shares of \$100.00 each; and it is averred that it used the works and pipes, etc., so

transferred to it, in manufacturing and distributing gas in the city.

The information sets out the proceedings for, and resulting in, the organization of "The Equitable Gas Light and Fuel Company of Chicago," in August, 1885, under the general Incorporation Law, showing its capital stock to be \$3,000,000.00 divided into 30,000 shares of \$100.00 each, and avers that an ordinance was passed by the common council of Chicago, giving said company the right to lay down gas pipes and mains in the streets, etc., and that said company kept and maintained such gas mains, etc., and sold gas, etc., in the South Division of the city.

The information still further alleges that the four companies above named, to-wit: The Chicago Gas Light and Coke Company, The People's Gas Light and Coke Company, The Consumers' Gas Company, and The Equitable Gas Light and Fuel Company of Chicago, were on April 29, 1887, and have been, and are the only gas companies engaged in that business and occupying the streets with gas mains in said city; that, in the ordinances, giving to the Consumers' Gas, Fuel and Light Company (succeeded by the Consumers' Gas Company) and to the Equitable Gas Light and Fuel Company the right to occupy the streets, it was provided that such ordinances should not take effect until said companies had given bonds binding themselves respectively not to sell, lease or transfer their franchises and privileges to any other gas company and not to enter into any combination with any other company concerning the rate or price to be charged for gas; that each of said corporations was by law designed to be and of right ought to be a separate, distinct, independent and competing corporation for the manufacture, sale and furnishing of illuminating gas to the consumers thereof in said city; that said four companies when combined and operating under one management or power of control, having a common interest to subserve, form a monopoly of the business of supplying and selling illuminating gas to the said city and its inhabitants, etc.

The information then closes as follows:

"And that heretofore, to-wit, on the 29th day of April, 1887, at the said county of Cook, the Chicago Gas Trust Company was, and from thence hitherto hath been, and still is, a cor-

poration and body politic, organized and existing under the laws of the State of Illinois, to-wit: 'An act entitled an act concerning corporations,' approved April 18, 1872, and the several acts amendatory thereof; and that the said Chicago Gas Trust Company, for and during the period of twelve months or more last past, at the county of Cook aforesaid, has usurped and unlawfully exercised, and now usurps and unlawfully exercises, powers, liberties, privileges and franchises not conferred by law, to-wit, the power, liberty, privilege and franchise of obtaining, by purchase, or in exchange for its own stock, and holding and owning, and then and there did purchase and receive in exchange for its own stock, and now holds, a majority and controlling interest of and in the shares of capital stock of the said Chicago Gas Light and Coke Company, the said People's Gas Light and Coke Company, the said Equitable Gas Light and Fuel Company of Chicago, and the Consumers' Gas Company, respectively, (as amended May 27, 1889,) and hath thereby, in manner and at the place aforesaid, unlawfully acquired and holds the power to manage and control the said four corporations, to-wit, the said Chicago Gas Light and Coke Company, the said People's Gas Light and Coke Company, the said Equitable Gas Light and Fuel Company of Chicago, and the said Consumers' Gas Company, and hath thereby, and in the manner and at the place aforesaid, destroyed the diversity of interest and motive for competition between them, which would otherwise exist, in the manufacture, distribution and sale of illuminating gas to the city of Chicago and its inhabitants, in said county, and hath thereby usurped and unlawfully secured to itself, in manner aforesaid, and, by means of holding such majority and controlling interest in the shares of stock of said four last mentioned gas companies, now usurps and unlawfully holds, the power, liberty and franchise of maintaining, through said four several gas companies last mentioned a virtual monopoly in the business of furnishing illuminating gas to said city of Chicago and the inhabitants thereof, and to the consumers of such gas in said city, to-wit, at the place aforesaid, to the great detriment and injury of the People of the State of Illinois,—all of which said powers, privileges and franchises so exercised by it as aforesaid, though not conferred by law, the said Chicago Gas

Trust Company, at and within said county, upon the People of the State of Illinois, hath so usurped and unlawfully exercised, and now doth so usurp and unlawfully exercise, contrary to law and the form of statute in such case made and provided, and against the peace and dignity of the People of the State of Illinois.”

Originally the information contained two counts, but the Attorney General entered a *nolle prosequi* as to the second count. Eleven pleas were filed to the first count as finally amended, by the Chicago Gas Trust Company, the defendant below. The first, third and seventh pleas allege, that the Chicago Gas Trust Company is a corporation, formed on the 28th day of April, A. D. 1887, under the general Incorporation Act of this State approved April 18, 1872, and in force July 1, 1872; said pleas set out in full all the proceedings for the organization of the defendant company, including the original statement filed with the Secretary of State, the license to the commissioners to open books for subscriptions to the capital stock, the report of the commissioners, and the certificate of organization issued by the Secretary of State, etc.

The statement so filed with the Secretary of State shows the name of the corporation to be the “Chicago Gas Trust Company,” that its capital stock is \$25,000,000.00 divided into 250,000 shares of \$100.00 each, that the location of its principal office is in Chicago, and that its duration is to be ninety-nine years. The statement also sets forth the object of the corporation in the following words:

“The object for which it is formed is to build, erect, purchase, lease, establish, maintain, enlarge, extend and operate or demise works in the city of Chicago, in the county of Cook and State of Illinois, and in such other place or places in said State of Illinois as said corporation may, by the vote of the majority of its stockholders, elect, for the manufacture, supply, sale and distribution of gas and electricity, or either, for the furnishing of light, heat, fuel and power, for any and all purposes for which gas or electricity may now or hereafter be used; and to purchase and hold or sell the capital stock, or purchase or lease or operate the property, plant, good will, rights and franchises, of any gas works, or gas company or companies, or any electric company or electric companies, in

said city of Chicago, Cook county, Illinois, or elsewhere in said State of Illinois, as said corporation may, by vote of the majority of the stockholders, elect; and to purchase, hold, sell, operate or anywise become interested in coal or other properties productive of material necessary or useful in the supply or manufacture of gas, or other agency or medium of light, heat, power or fuel, and to sell, improve, enlarge, extend, maintain, operate or demise any and all property so purchased or leased."

The first, third and seventh pleas aver that the defendant has used and exercised and still does use and exercise "the said power, liberty, privilege and franchise of purchasing and holding *the* capital stock of gas companies in the State of Illinois," and "has purchased and still holds *capital stock* of the four gas companies mentioned in said information," etc. The 2d, 4th, 5th, 6th, 9th, 10th and 11th pleas aver that the Chicago Gas Trust Company "has purchased and now holds a majority of the shares of the capital stock of the said" four companies, and "that it might lawfully purchase the said shares of stock because among the powers conferred upon it by its charter from the State of Illinois was the power to purchase capital stock of any gas company or companies in the city of Chicago, county of Cook or elsewhere in the State of Illinois." In the 5th, 6th, 9th and 11th pleas the power is described as the "power to purchase *the* capital stock," and not as the "power to purchase capital stock." The 2d, 4th and 10th pleas describe the power as the "power to purchase capital stock." The 4th, 10th and 11th pleas use the words, "articles of association," in the place of the word, "charter." The 8th plea avers that the defendant "has purchased and now holds a majority of the shares of the capital stock of the said" four companies, "as well it might do, being lawfully authorized so to do by the provisions of its articles of incorporation."

Several of the pleas deny that the defendant has interfered with the control or operation of the four companies, and aver that said companies have been operated independently of each other and the defendant. Several deny that defendant has destroyed the diversity of interest or motive for competition between the four companies. One or more of the pleas deny

that defendant has usurped or that it holds the power, liberty and franchise of maintaining through said gas companies a virtual monopoly in the business of furnishing gas, etc.

The Attorney General demurred to the eleven pleas. The court below overruled the demurrer. The Attorney General stood by the demurrer and final judgment of *nil capiat* was rendered on June 24, 1889. From that judgment an appeal is taken to this Court. The errors assigned are the overruling of the demurrer to each of the pleas, and rendering final judgment for the defendant below on the demurrer.

MR. JUSTICE MAGRUDER delivered the opinion of the Court:

The Chicago Gas Trust Company, appellee herein, was organized under the general incorporation law of this state. The statement filed by the original incorporation with the secretary of state sets forth that the trust company was formed for two objects, or for one object of a two-fold character. The object named in the first clause of the second specification of the "statement" is, in brief, the erection and operation of works in Chicago, and other places in Illinois, for the manufacture, sale, and distribution of gas and electricity. The object named in the second clause of the second specification of the statement is, in brief, "to purchase and hold or sell the capital stock" of any gas or electric company or companies in Chicago, or elsewhere in Illinois.

In this proceeding no attack is made upon the validity of the organization of the gas trust company as a corporation. That it was formed in strict conformity with the requirements of the general incorporation law is not denied by the people. Nor does the state here question the right of the appellee company to acquire and operate works for the manufacture and sale of gas and electricity, in pursuance of the object designated in the first clause above mentioned. Hence the controversy arising upon the demurrer to the pleas in this case is not as to the right of appellee to exist as a corporation, nor as to its right to exercise the first one of the powers sought to be conferred upon it by its charter.

The controversy presented by the record relates solely to the authority of the appellee to carry out the object desig-

nated in the second clause above mentioned. It is claimed on the part of the people that the charter or articles of association of the gas trust company did not and could not confer upon it the power "to purchase and hold * * * the capital stock" of other gas companies. It is averred in the information, and admitted in eight of the eleven pleas, that appellee has purchased, and now holds, a majority of the shares of the capital stock of four gas companies, to-wit, the Chicago Gas-Light & Coke Company, the People's Gas-Light & Coke Company, the Equitable Gas-Light & Fuel Company, and the Consumer's Gas Company; and it is admitted in three of the pleas that the appellee has purchased, and now holds, some portion of the capital stock of said four companies.

The information charges that, by so purchasing and holding a majority of the shares of the capital stock of each of the four companies, the appellee usurps and exercises "powers, liberties, privileges, and franchises not conferred by law." The appellee pleads, in justification, that the power so to purchase and hold the stock is granted by the terms of its charter.

Can the Chicago Gas Trust Company lawfully purchase and hold the stock of other gas companies?

A distinction is sought to be drawn between "capital stock" and "shares of stock." It is said that capital stock means the entire property owned by the corporation, while a share in the stock is the right to partake, according to the amount put into the fund, of the surplus profit obtained from the use and disposal of the capital stock of the company to those purposes for which the company is constituted. It is therefore insisted by the appellant that, even if the charter of the appellee can be held to confer the power to purchase and hold the general property or funds of other gas companies, it does not for that reason confer the power to purchase and hold shares of stock in such other companies.

The distinction contended for undoubtedly exists under certain circumstances, and for certain purposes; but we think that, in the present case, the words, "the capital stock of any gas company or companies," are broad enough to include shares of stock. In the general incorporation act, under which the appellee and Consumers' Gas Company and the Equitable

Gas-Light & Fuel Company are all organized, the statement is required to set forth "the name of the proposed corporation, the object for which it is to be formed, its capital stock, the number of shares of which such stock shall consist," etc. The original charter of the Chicago Gas-Light & Coke Company provides that "the capital stock of said company shall not exceed \$300,000, to be divided into shares of \$25," etc. The charter of the Peoples' Gas-Light & Coke Company, as amended in 1865, also provides that its capital stock may be divided into shares. The terms thus used designate the capital stock of a corporation as that which consists of, or may be divided into, shares. Hence, for the purposes of the present discussion, "the capital stock of any gas company" may be regarded as the aggregate of all the shares of such stock.

The first, third, and seventh pleas aver that the defendant uses and exercises "the power, liberty, privilege, and franchise of purchasing and holding the capital stock of gas companies in the state of Illinois," and that in such use and exercise thereof "it has purchased, and still holds, capital stock of four companies," etc., without stating how much capital stock it holds. The demurrer to these pleas might well have been sustained, on the ground that they do not answer the information. The information charges that the defendant has purchased and holds a majority of the shares of stock in each of the four companies, while the pleas answer by saying that defendant holds "capital stock," and do not set forth whether the stock so held is a majority, or less than a majority, of the shares. If it be conceded, however, that the three pleas are not defective for the reason thus specified, they present the question whether appellee can lawfully purchase and hold shares of stock in other gas companies; the number of such shares being less than a majority, and therefore too small to give a controlling interest in such other companies.

There are two views which may be taken of the power to purchase and hold the capital stock of other gas companies, as designated in said second clause. Must it be regarded as an original, independent power, intended to exist exclusively and in addition to the power named in the first clause, or may it be considered as merely ancillary to the other power of maintaining and operating works for the manufacture and

sale of gas? If the latter view be correct, the main object for which the gas trust company was formed would be that it might itself maintain and operate works for the manufacture and sale of gas, while the purchase of shares of stock in other companies would be merely a subordinate object, incidental only to the main purpose of the corporate formation. An illustration of this idea may be found in the general law of this state in regard to life insurance companies, which makes it lawful for a life insurance company, organized in the state, to "invest its funds or accumulations in the stocks of the United States, • • • or in such other stocks or securities as may be approved by the auditor." The main object of forming such a company is to engage in the business of life insurance, but the power to invest surplus funds in certain stocks is given as an incident to such business.

Can the power to purchase and hold the stock of other gas companies be lawfully exercised by the appellee, as incidental to the main purpose of maintaining and operating works for the manufacture and sale of gas?

Corporations can only exercise such powers as may be conferred by the legislative body creating them, either in express terms or by necessary implication; and the implied powers are presumed to exist to enable such bodies to carry out the express powers granted, and to accomplish the purposes of their creation. *Railroad Co. v. Marseilles*, 84 Ill. 643; *Coke Co. v. Coke Co.*, 121 Ill. 530. An incidental power is one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has a slight or remote relation to it. *Hood v. Railroad Co.*, 22 Conn. 1; *Franklin Co. v. Institution*, 68 Me. 48.

Where a charter, in express terms, confers upon a corporation the power to maintain and operate works for the manufacture and sale of gas, it is not a necessary implication therefrom that the power to purchase stock in other gas companies should also exist. There is no necessary connection between manufacturing gas and buying stocks. If the purpose for which a gas company has been created is to make and sell gas and operate gas-works, the purchase of stock in other gas companies is not necessary to accomplish such purpose. "The right of a corporation to invest in shares of another company

cannot be implied, because both companies are engaged in a similar kind of business." 1 Mor. Priv. Corp. § 431.

It is true that a gas company might take the stock of another corporation in payment of a debt, or perhaps as security for a debt; but the actual purchase of such stock is not directly and immediately appropriate to the execution of a specifically granted power to operate gas-works and manufacture gas. Some corporations, like insurance companies, may find it necessary to keep funds on hand for the payment of losses by death or fire, or to meet other necessary demands; but it is questionable whether even these can invest their surplus funds in the stocks of other corporations, without special legislative authority. But there is nothing in the nature of a gas company which renders it proper for such a company to accumulate funds for outside investment. Its surplus profits belong to the stockholders, and, when distributed among them, can be used by them as they see fit.

If, then, the power to purchase outside stocks cannot be implied from the power to operate gas-works, and make and sell gas, a company to whom the latter power has been expressly granted cannot exercise the former without legislative authority to do so. This is the law, as settled by the great weight of authority.

Boone, on the Law of Corporations, says: "Without a power specifically granted or necessarily implied, a corporation cannot become a stockholder in another corporation, and especially where the object is to obtain the control or affect the management of the latter." Section 107. In Green's Brice's *Ultra Vires* (page 91, note b) it is said: "In the United States a corporation cannot become a stockholder in another corporation unless by power specifically granted by its charter, or necessarily implied in it." So, also, 1 MORAWETZ on Private Corporations (sections 431, 433) says: "A corporation has no implied right to purchase shares in another company for the purpose of controlling its management. * * * A corporation cannot, in the absence of express statutory authority, become an incorporator by subscribing for shares in a new corporation, nor can it do this indirectly, through persons acting as its agents or tools." The authorities referred to by these text-writers sustain the conclusions

announced by them. It has been held in many cases that "in the United States corporations cannot purchase or hold or deal in the stocks of other corporations, unless expressly authorized to do so by law;" and that "one corporation cannot become the owner of any portion of the capital stock of another corporation, unless authority to become such is clearly conferred by statute." *Franklin Co. v. Institution*, *supra*; *Bank v. Bank*, 36 Ohio St. 350; *Milbank v. Railroad Co.*, 64 How. Pr. 20; *Sumner v. Marey*, 3 Woodb. & M. 105; *Bank v. Agency Co.*, 24 Conn. 159; *Railroad Co. v. Collins*, 40 Ga. 582; *Hazlehurst v. Railroad Co.*, 43 Ga. 13; *Berry v. Yates*, 24 Barb. 199.

The special charters of the Chicago Gas-Light & Coke Company and of the People's Gas-Light & Coke Company, which are set out in full in the information, and not called in question in any of the pleas, confer, by express grant, the power to erect gas-works, and manufacture and sell gas, etc., but do not confer the power to buy shares of stock in other companies. Upon the latter subject they are silent. It will not be denied that, under the authorities already cited, these two companies cannot buy and hold stock in other gas companies. The same would undoubtedly be admitted to be true of the Chicago Gas Trust Company, if it held under a special charter of like tenor and effect, granted before the adoption of the constitution of 1870. Does it make any difference that the appellee was organized under the general incorporation act?

The general incorporation act of this state does not, in express terms, confer upon the corporations organized under it the power to purchase and hold shares of stock in other corporations. It is silent upon that subject. The only powers granted by it are the ordinary corporate powers, such as the rights to be bodies corporate and politic, to sue and to be sued, to have a common seal, etc. The charter of a corporation formed under such a general law does not consist of the articles of association alone, but of such articles taken in connection with the law under which the organization takes place. 1 Mor. Priv. Corp. § 318. The provisions of the law enter into and form a part of the charter. It certainly cannot be true that a corporation formed under the general incorporation act, for a purpose other than that of dealing in stocks, can exercise

the power of purchasing and holding stock in other corporations, where such power cannot be necessarily implied from the nature of the power specifically granted, and is not necessary to carry the latter into effect.

The power to purchase and hold stock in other companies must be the subject of legislative grant, if not in all cases, at least in cases where it cannot be implied from the powers expressly granted. The general incorporation law contains no grant of such power by the legislature. Can a corporation organized under that law be clothed with such a power by merely naming it in the statement filed with the secretary of state? We think not. The action of the secretary of state in issuing the license and the certificate of organization is necessarily, to a large extent, merely ministerial. *Navigation Co. v. Railway Co.*, 130 U. S. 1; 4 Amer. & Eng. Cyclop. Law, tit. "Corporations," p. 192, note 1. Whether the articles of association, consisting of the statement, the license, the report of the commissioners, the certificate of organization, etc., do or do not confer such rights and powers as are authorized by the law is a matter for judicial determination. Counsel for appellee say: "We do not claim, of course, that the action of the secretary of state is conclusive, and not subject to review by this court," etc.

The question whether or not the power to purchase stock is a lawful purpose, under section 1 of the incorporation act, which provides that "corporations may be formed in the manner provided by this act, for any lawful purpose," [Rev. St. Ill. c. 32, § 1,] does not arise under this branch of the discussion. It will be pertinent, when we come to consider the right to buy and hold stock, as an original and independent power or object of formation. It is not denied by the appellant that the organization of appellee for the purpose of erecting gas-works and making and selling gas is an organization for a lawful purpose. Viewing that as the main purpose for which appellee was formed, the incorporators could not tack on and connect with such main purpose the power to buy and hold stock in other gas companies, by merely describing such power in the statement. To hold that they could confer such power by writing it down in the statement would be to hold

that the general assembly could clothe them with a part of its legislative functions.

When a corporation is formed under the general incorporation act, for the purpose of carrying on a lawful business, the law, and not the statement or the license or the certificate must determine what powers can be exercised as incidents of such business. Even if shares of stock be regarded as personal property, as claimed by counsel for appellee, section 5 of the general law provides that corporations formed under it "may own * * * so much * * * personal estate as shall be necessary for the transaction of their business, and may sell and dispose of the same when not required for the uses of the corporation, * * * and may have and exercise all the powers necessary and requisite to carry into effect the objects for which they may be formed." [Rev. St. Ill. c. 32, § 5.] This language negatives the idea that a corporation formed under the general law can exercise the power of buying and holding the stock of other companies. A company engaged on its own account in manufacturing and selling gas does not need the stock of other gas companies in order to transact its business. Hence it is forbidden to own such stock, the same being "personal estate."

The language of the act, as thus quoted, expressly restricts the powers of a corporation organized under it to such powers as are necessary and requisite to carry into effect the object for which it was formed. We have already seen that, where the object of forming a gas company is to engage in the business of making and selling gas, the purchase of stock in other companies is not necessary to carry such object into effect. Therefore the general incorporation act not only does not expressly authorize the purchase of such stock, but impliedly forbids it in cases where the main purpose of the corporate creation is other than the purchase and sale of stocks.

It has been held that the powers obtained by the corporations organized under general laws are necessarily restricted to those mentioned in the act, (*Medical College Case*, 3 Whart. 445;) that in such cases the charter is void as to all powers and privileges granted beyond the provisions of the statute, (*Heek v. McEwen*, 12 Lea, 97;) that, if unauthorized provisions are added to the articles of incorporation, all acts done pursuant

to such provisions will be void, (*Plank-Road Co. v. Vaughan*, 14 N. Y. 546;) that anything in such articles not warranted by the statutes authorizing the formation of corporate bodies is void for want of authority, (*Navigation Co. v. Railway Co.*, 130 U. S. 1,) and that such articles must be construed strictly and against the grantee, and in favor of the government or the general public, (*Id.*).

Our conclusion upon this branch of the case is that, if the Chicago Gas Trust Company be regarded as a corporation formed for the purpose of erecting or operating gas-works and manufacturing and selling gas, it has no power to purchase and hold or sell shares of stock in other gas companies as an incident to such purpose of its formation, even though such power is specified in its articles of incorporation.

We come, now, to the second view of the right to purchase and hold the stock of other companies, which is involved in the issue presented by demurrers to all of the 11 pleas, including the first, third, and seventh. The eight pleas other than the three last named are bad on demurrer, because they do not set out the defendant's title specially. It is not enough to allege generally that the power or franchise in question was among the powers conferred by the charter; the pleas should set forth particularly and in detail the facts, which show how the corporate power or franchise was conferred upon or acquired by the defendant. (*Clark v. The People ex rel.* 15 Ill. 213; *Carrico v. The People*, 123 Id. 198.)

But if this technical objection be waived, the eight pleas are demurrable for reasons which go to the merits. Some of them aver that the charter confers the power to purchase "*the capital stock*" of other gas companies, which, as hereinafter stated, means *all* the capital stock of such companies. Others of them are less explicit. But all of them aver that the charter granted a power broad enough to authorize the purchase of a majority of the shares of the capital stock of other gas companies, and that, under it, such majority of shares has been purchased. All of them plead the right to so purchase a majority of said shares as an original and independent power or franchise without reference to the other power of making and selling gas. Hence they fall within the objections hereinafter stated.

The language of the statement, as set out in the first, third and fourth pleas, imports an intention to create the Chicago Gas Trust Company for two independent objects. The clauses describing these objects are connected by the conjunction "and." Both were designed to be of equal importance, and to be carried out independently of each other. According to the plain meaning of terms in which they are set forth, neither was to be regarded as secondary or incidental. The first of these objects is stated as follows: "To build, erect, purchase, lease, establish, maintain, enlarge, extend, and operate or demise works in * * * Chicago, * * * and in such other place or places in * * * Illinois as said corporation may, by the vote of the majority of its stockholders, elect, for the manufacture, supply, sale, and distribution of gas and electricity, or either, for the furnishing of light, heat, fuel, and power," etc. There is nothing in this record to show that appellee has ever done anything towards the accomplishment of this first object.

The second of the two objects is stated as follows: "And to purchase and hold or sell the capital stock, or purchase or lease or operate the property, plant, good-will, rights, and franchises, of any gas-works, or gas company or companies, or any electric company or electric companies, in * * * Chicago, * * * or elsewhere, in * * * Illinois, as said corporation may, by vote of the majority of the stockholders, elect," etc.

Manufacturing and selling gas is one kind of business; dealing in stocks is another and different kind of business. If it appeared that the appellee was engaged in both, under its present charter, a serious question might arise as to the power to organize one corporation for two distinct purposes, under the general incorporation act of this state. This record, however, only shows that the appellee is exercising the power designated by the declaration of the second object of its formation. What is the power which it is so exercising?

If appellee can "purchase and hold the capital stock" of other gas companies, it can hold all the capital stock of such companies. "The capital stock" does not mean a part, but the whole. We have already seen that the "capital stock," as those words are here used, includes all the shares of stock.

This view is strengthened by the use of the words, "or purchase or lease or operate the property, plant, good-will, rights, and franchises" of any gas company. If "capital stock" meant nothing but property, the right to purchase property would not be mentioned in separate words. Counsel for appellee say in their brief: "It is a pretty nice distinction to say that the power to buy capital stock of a corporation does not include the power to purchase certain of the shares of that stock." If power to purchase "capital stock" includes the power to purchase "certain of the shares of the stock," then power to purchase "the capital stock" includes the power to purchase all the shares of such stock.

The power sought to be conferred by these articles of association is something more than the mere right of purchasing certain shares of stock of other gas companies as an investment. An attempt has been made to vest the Chicago Gas Trust Company with the tremendous power of purchasing and holding all the shares of stock, and purchasing and operating all the property, rights, and franchises, of every gas company, not only in Chicago, but in the state of Illinois. What has been done under the power thus claimed to have been lawfully granted?

There were four gas companies in the city of Chicago, whose names have already been mentioned. One of them, under an old charter of 1849, had the right to lay its mains and pipes in the streets without permission of the city. The other three had permission to do so under ordinances passed by the city council. All of them laid their pipes and mains, and were engaged in making gas and furnishing it to the inhabitants. They were the only gas companies who were so engaged, and who had undertaken to make such use of the public streets. The Chicago Gas Trust Company has purchased and now holds a majority of all the shares of stock of these four companies. It was itself organized with a capital stock of \$25,000,000. The capital stock of the four companies was \$16,984,200. How great a majority of such stock is held by the appellee does not appear from the record. What results must necessarily follow from such ownership of a majority of the shares of stock of these four companies?

One result is that the Chicago Gas Trust Company can con-

trol the four other companies. The question is not whether it has attempted to exercise such control; the law looks to the general tendency of the power conferred. *Greenh. Pub. Pol.* 5; *Richardson v. Crandall*, 48 N. Y. 348; *Salt Co. v. Guthrie*, 35 Ohio St. 666. The sixth section of the general incorporation act provides that the corporate powers shall be exercised by a board of directors or managers, and that the number of such directors or managers, and their terms of office, shall depend upon "the consent of the owners of a majority of the shares of stock." It cannot be denied that the appellee, as owner of the majority of the shares of stock of these four companies, can control them, in the exercise of all their corporate powers, through a board of managers of its own selection. In *Weidenger v. Spruance*, 101 Ill. 278, this court, speaking through Mr. Justice SCHOLFIELD, said: "The stockholders elect the directors, and, through them, carry into effect the corporate functions. Presumably, the directors act in obedience to the aggregate wishes of the stockholders," etc. *Milbank v. Railroad Co.*, 64 How. Pr. 29.

The control of the four companies by the appellee — an outside and independent corporation — suppresses competition between them, and destroys their diversity of interest, and all motive for competition. There is thus built up a virtual monopoly in the manufacture and sale of gas.

The fact that the appellee, almost immediately after its organization, bought up a majority of the shares of stock of each of these companies shows that it was not making a mere investment of surplus funds, but that it designed and intended to bring the four companies under its control, and, by crushing out competition, to monopolize the gas business in Chicago.

The general incorporation act provides "that corporations may be formed, in the manner provided in this act, for any lawful purpose, except banking, insurance, real estate, brokerage, the operation of railroads, and the business of loaning money." [Rev. St. Ill., c. 32, § 1.] The purpose for which a corporation is formed, under the act, must be a lawful purpose. So far as appellee was organized with the object of purchasing and holding all the shares of the capital stock of any gas company in Chicago or Illinois, it was not organized

for a lawful purpose, and all acts done by it towards the accomplishment of such object are illegal and void.

The word "unlawful," as applied to corporations, is not used exclusively in the sense of *malum in se* or *malum prohibitum*. It is also used to designate powers which corporations are not authorized to exercise, or contracts which they are not authorized to make, or acts which they are not authorized to do; or, in other words, such acts, powers, and contracts as are *ultra vires*. *Franklin Co. v. Institution*, *supra*; *Navigation Co. v. Railway Co.*, *supra*.

The business of manufacturing and distributing illuminating gas, by means of pipes laid in the streets of a city, is a business of a public character. It is the exercise of a franchise belonging to the state. The services rendered and to be rendered for such a grant are of a public nature. Companies engaged in such business owe a duty to the public. Any unreasonable restraint upon the performance of such duty is prejudicial to the public interest, and in contravention of public policy. *Coke Co. v. Coke Co.*, 121 Ill. 530; *Gibbs v. Gas Co.*, 130 U. S. 396.

Whatever tends to prevent competition between those engaged in a public employment or business impressed with a public character is opposed to public policy, and therefore unlawful. Whatever tends to create a monopoly is unlawful, as being contrary to public policy. 2 Add. Cont. 743; *Greenh. Pub. Pol.* 180, 643, 654, 655, 670; *Coal Co. v. Coal Co.*, 68 Pa. St. 173; *Craft v. McConoughy*, 79 Ill. 346; *Railroad Co. v. Collins*, 40 Ga. 582; *Hazlehurst v. Railroad Co.*, 43 Ga. 13; *Transportation Co. v. Pipe Line Co.*, 22 W. Va. 600.

In *Craft v. McConoughy*, *supra*, where the opinion was delivered by Mr. Justice CRAIG, we said: "We understand it to be a well-settled rule of law that an agreement in general restraint of trade is contrary to public policy, illegal, and void. * * * Whatever is injurious to the interest of the public is void, on the ground of public policy." In *Salt Co. v. Guthrie*, *supra*, the supreme court of Ohio said: "Public policy unquestionably favors competition in trade, to the end that its commodities may be afforded to the consumer as cheaply as possible, and is opposed to monopolies which tend to advance market prices, to the injury of the general public."

We are reminded by counsel that the application by the courts of public policy to the law is a usurpation of legislative functions. And undoubtedly some courts have gone so far as to deserve the charge of such usurpation. But it is the duty of the judiciary to refuse to sustain that which is against the public policy of the state, when such public policy is manifested by the legislation or fundamental law of the state. *Academy v. Sullivan*, 116 Ill. 375. By chapter 28 of our Revised Statutes, it is provided that "the common law of England, so far as the same is applicable and of a general nature, * * * shall be the rule of decision, and shall be considered of full force until repealed by legislative authority." Public policy is that principle of law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public, or against the public good. This principle owes its existence to the very sources from which the common law is supplied. *Greenh. Pub. Pol.* 2, 3.

The common law will not permit individuals to oblige themselves by a contract either to do or not to do anything; when the thing to be done or omitted is in any degree clearly injurious to the public. *Chappel v. Brockway*, 21 Wend. 159; *Transportation Co. v. Pipe Line Co.*, 22 W. Va. 600. In *Stanton v. Allen*, 5 Denio, 434, an agreement, whose tendency was to prevent competition, was held to be void by the principles of the common law, because it was against public policy, and injurious to the interests of the state.

"Contracts creating monopolies are null and void, as being contrary to public policy." 2 Add. Cont. 743. All grants creating monopolies are made void by the common law. 7 Bac. Abr. 22. In the Case of the Monopolies, 11 Coke, 84, it was decided, as long ago as the forty-fourth year of the reign of Queen Elizabeth, that a "grant to the plaintiff of the sole making of cards within the realm was utterly void, and that for two reasons: (1) That it is a monopoly, and against the common law; (2) that it is against divers acts of parliament," etc. *Bell v. Leggett*, 7 N. Y. 176; *Trist v. Child*, 21 Wall. 441.

If contracts and grants whose tendency is to create monopolies are void at common law, then, where a corporation is organized under a general statute, a provision in the declaration

of its corporate purposes, the necessary effect of which is the creation of a monopoly, will also be void.

Speaking of the articles of association of corporations formed under general laws, the supreme court of the United States says: "We have to consider, when such articles become the subject of construction, that they are, in a sense, *ex parte*. Their formation and execution—what shall be put into them, as well as what shall be left out—do not take place under the supervision of any official authority whatever. They are the production of private citizens, gotten up in the interest of the parties who propose to become corporators, and stimulated by their zeal for the personal advantage of the parties concerned rather than the general good. * * * These articles, which necessarily assume by the sole action of the corporators enormous powers, many of which have been heretofore considered of a public character, sometimes affecting the interests of the public very largely and very seriously, do not commend themselves to the judicial mind as a class of instruments requiring or justifying any very liberal construction. Where the question is whether they conform to the authority given by statute in regard to corporate organizations, it is always to be determined upon just construction of the powers granted therein, with a due regard for all the other laws of the state upon that subject. * * * The manner in which these powers shall be exercised, and their subjection to the restraint of the general laws of the state, and its general principles of public policy, are not in any sense enlarged by inserting in the articles of association the authority to depart therefrom." *Navigation Co. v. Railway Co.*, *supra*.

In the *Oregon Railway Case*, *supra*, a railroad corporation had been organized under a general law of the state of Oregon which contained the following provision: "Whenever three or more persons shall desire to incorporate themselves for the purpose of engaging in any lawful enterprise, business, pursuit, or occupation, they may do so in the manner provided in this act;" and it was declared in the articles of association that the company might exercise the power to lease the railroad. The court there held that the power to lease its road, and turn over the use of its franchises to another company, was not authorized by the general incorporation act of the state, nor by the

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course of legislation therein, and that, therefore, such power could not be conferred by the declaration contained in the articles of association. The leasing of the road, in the absence of statutory authority therefor, was not sanctioned as being a "lawful enterprise," within the meaning of the language above quoted.

The public policy of a state may be indicated by the provisions of its constitution as related to past and present legislation. In *Gas-Light Co. v. Manufacturing Co.*, 115 U. S. 650, a gas company had been given, in 1835, the exclusive privilege of making and selling gas in New Orleans for some 50 years, and the question was whether such exclusive privilege was abrogated by the new constitution of 1879, which contained a provision abolishing the monopoly features in all existing charters. The United States supreme court said in that case: "The monopoly clause only evinces a purpose to reverse the policy, previously pursued, of granting to private corporations franchises, accompanied by exclusive privileges, as a means of accomplishing public objects."

We have been referred to more than 50 special charters granted by the legislature of this state, in the years 1853, 1854, 1855, 1857, 1859, 1861, 1865, 1867, and 1869, to gas companies in various cities and towns in the state, each one of which confers the exclusive privilege of laying gas-pipes in the streets for a number of years. But when the constitution of 1870 was adopted it provided in section 22, art. 4, that the general assembly should pass no local or special law for "granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever;" and in section 1 of article 11, that "no corporation shall be created by special laws, * * * but the general assembly shall provide, by general laws, for the organization of all corporations hereafter to be created."

Manifestly the constitution of 1870 reversed the old policy of granting exclusive privileges to gas companies. After 1870 the public policy of the state was against the granting of exclusive privileges to corporations of any kind. The general incorporation act of 1872 was passed in pursuance of section 1, art. 11. The prohibition of special charters granting exclusive privileges, and the authorization of incorporations under

a general law, followed by the passage of such a law, put the people of this state on record as being opposed to the creation of monopolies of all kinds.

But of what avail is it that any number of gas companies may be formed under the general incorporation law, if a giant trust company can be clothed with the power of buying up and holding the stock and property of such companies, and, through the control thereby attained, can direct all their operations, and weld them into one huge combination? The several privileges or franchises intended to be exercised by a number of companies are thus vested exclusively in a single corporation. To create one corporation for the express purpose of enabling it to control all the corporations engaged in a certain kind of business, and particularly a business of a public character, is not only opposed to the public policy of the state, but is in contravention of the spirit, if not the letter, of the constitution.

That the exercise of the power attempted to be conferred upon the appellee company must result in the creation of a monopoly results from the very nature of the power itself. If the privilege of purchasing and holding all the shares of stock in all the gas companies of Chicago can be lawfully conferred upon appellee under the general incorporation act, it can be lawfully conferred upon any other corporation formed for the purpose of buying and holding all the shares of stock of said gas companies. The design of that act was that any number of corporations might be organized to engage in the same business, if it should be deemed desirable. But the business now under consideration could hardly be exercised by two or three corporations. Suppose that, after appellee had purchased and become the holder of the majority of shares of stock of the four companies in Chicago, another corporation had been organized with the same object in view; that is to say, for the purpose of purchasing and holding a majority of the shares of stock of the gas companies in Chicago, there being only four of such companies. What would there be for the corporation last formed to do? It could not carry out the object of its creation, because the stock it was formed to buy was already owned by an existing corporation. Hence to grant to the appellee the privilege of purchasing and holding the capital stock of any gas company in Chicago is to grant to it a privilege

which is exclusive in its character. It is making use of the general incorporation law to secure a special "privilege, immunity, or franchise;" it is obtaining a special charter under the cover and through the machinery of that law, for a purpose forbidden by the constitution. To create one corporation that it may destroy the energies of all other corporations of a given kind, and suck their life-blood out of them, is not a "lawful purpose."

It may be here stated, as showing the policy of the state to be against the purchase by one gas company of stock in other corporations, that the power to purchase such stock is not granted in any of the more than 50 special charters above named. On the contrary, in each of these charters the power of the gas company to acquire and hold personal property is limited to such personal estate "as may be necessary and proper for the construction, extension, and usefulness of the works of said company, and for the management and good government of the same."

The power of purchasing and holding the capital stock of the four gas companies in question tends to relieve appellee of a proper share of its legal obligations, and to enable it to carry on a gas business without subjecting itself to the restrictions imposed by the statute. To this extent the exercise of such power is not lawful.

The successful operation of a gas company in any city requires the use of the public streets for the purpose of laying pipes and mains. Section 1, art. 5, of the general act, for the incorporation of cities and villages, confers upon the city council the power to regulate the use of the streets, to provide for the lighting of the same, and to regulate the openings therein for the laying of gas pipes and mains, and erecting gas-lights. By the same section it is also provided that any company "organized for the purpose of manufacturing illuminating gas to supply cities or villages, or the inhabitants thereof, with the same, shall have the right, by consent of the common council, (subject to existing rights,) to erect gas factories, and lay down pipes in the streets or alleys of any city or village in this state, subject to such regulations as any such city or village may by ordinance impose."

The general act for the formation of corporations, considered

with reference to the powers conferred by it upon gas companies organized under it, must be construed in connection with the city incorporation act. The provisions of the latter act, as above quoted, are to be considered as a part of every charter granted to a gas company under the former act. The charter, or, speaking more accurately, the articles of association, of every such gas company can only be issued or accepted subject to the foregoing provisions. Hence the appellee company could not exercise the power of operating works for the manufacture and sale of gas in Chicago without submitting to such regulations as the common council of the city might by ordinance impose, nor could it erect a gas factory and lay its pipes in the streets without the consent of the common council. It accepted its certificate of organization subject to the condition that it would obtain such consent and submit to such regulations, if it engaged in the business of making and selling gas in that city. As between it and the state, it was bound to fulfill this condition in its capacity as a separate and independent organization, and not as the governing influence in the directories of other organizations.

But it either does or may engage in the business of making and selling gas in Chicago without obtaining the consent of the council, and without submitting to the regulations of the city, by operating through the four companies, a majority of whose stock it owns, and whose business it can therefore control. It thus indirectly makes use of privileges granted to the four companies, but never granted directly to itself. The regulations which the common council might have deemed it necessary to make, with reference to the use of the streets by appellee, may not have been the same as those which the four companies were required to submit to.

But this is not all. By the terms of the provision above quoted, appellee could only obtain the consent of the council to erect gas factories and lay pipes in the streets of the city "subject to existing rights." What were "existing rights?" The rights already secured by the four companies to use the streets and alleys, and make and sell gas. But the appellee, through the controlling interest which it owns in the stock of the four companies, can use the streets, and make and sell gas, independently of the existing rights of the four companies;

and not only so, but it either does or may absorb, combine, and use the rights of said companies, and subordinate them to its own purposes.

In the mode thus indicated, the appellee, in the exercise of the extraordinary power sought to be conferred upon it, may avoid the wholesome restrictions of the law applicable to the circumstances under which gas companies are permitted to use the public streets. By the use of the words "subject to existing rights" in the city incorporation act, the legislature plainly indicated its intention that there should be no combination between gas companies, but that each should separately pursue its business of furnishing gas to the inhabitants. If every new company seeking the consent of the council to its use of the streets for laying gas-pipes is required to accept such consent, "subject to existing rights," the companies already existing, and already exercising the rights of using the streets and furnishing light, must be allowed to continue to do so, and to do so independently of the new company, and as separate organizations under their respective charters.

Gas companies, being engaged in a business of a public character, are charged with the performance of public duties. Their use of the streets whose fee is held by the municipal corporation, in trust for the benefit of the public, has been likened to the exercise of the power of eminent domain. *Coke Co. v. Coke Co.*, supra. In *Gibbs v. Gas Co.*, supra, the supreme court of the United States, in an able opinion delivered by Mr. Chief Justice FULLER, uses these words: "These gas companies entered the streets of Baltimore under their charters, in the exercise of the equivalent of the power of eminent domain, and are to be held as having assumed an obligation to fulfill the public purposes to subserve which they were incorporated."

The privileges awarded to the four gas companies under their respective charters were given them in return for and in consideration of services to be rendered by them to the public. When they entered the streets of Chicago, they assumed the performance of the public duty of furnishing light to the inhabitants. That they should be permitted or required or forced to abandon the performance of such public duty is against the policy of the law. The public duty is imposed upon each company separately, and not upon the four, when com-

bined together. Each for itself, when it accepted its articles of association, assumed an obligation to perform the objects of its incorporation. But the appellee, through the control which it does or may exercise over the four companies by reason of its ownership of a majority of their stock, renders it impossible for them to discharge their public duties, except at the dictation of an outside force, and in the manner prescribed by a corporation operating independently of them. They are thus virtually forced to abandon the performance of their duty to the public. The freedom and effectiveness of their action in carrying out the purposes of their creation are seriously interfered with, if not actually destroyed. A power whose exercise leads to such a result cannot be lawfully intrusted to any corporate body.

We held in *Coke Co. v. Coke Co.*, *supra*, that, for the reasons there stated, a contract between two of these four companies, the effect of which was to stifle competition between them, and necessitate an abandonment of their public duties, was against public policy, and could not be enforced. The attempt to consolidate the two companies by placing the majority of their stock in the hands of the appellee would accomplish the same unlawful result which was sought to be obtained by the forbidden contract.

In ordinances passed by the common council of the city of Chicago, granting permission to the other two of the four companies, to-wit, the Equitable Gas-Light & Fuel Company, and the Consumers' Gas Company, (or its predecessor,) to lay pipes in the streets for the purpose of supplying gas to the inhabitants of the city, it was provided that such permission should not take effect until the two last-named companies had given bond not to "sell, lease, or transfer their franchises and privileges to any other gas company," and not to "enter into any combination with any other company concerning the rate (or price) to be charged for gas." But the Chicago Gas Trust Company, by reason of its ownership of the majority of the shares of stock of the Consumers' Company and the Equitable Company, can effect a virtual transfer of their franchises and privileges to itself, in spite of the condition imposed by the ordinance, and in utter disregard of the public interests.

We concur in the following views expressed by the supreme court of Georgia in the case of *Railroad Co. v. Collins*, supra: "All experience has shown that large accumulations of property in hands likely to keep it intact for a long period are dangerous to the public weal. Having perpetual succession, any kind of a corporation has peculiar facilities for such accumulation, and most governments have found it necessary to exercise great caution in their grants of corporate powers. Even religious corporations, professing, and in the main, truly, nothing but the general good, have proven obnoxious to this objection, so that in England it was long ago found necessary to restrict them in their powers of acquiring real estate. Freed, as such bodies are, from the sure bound to the schemes of individuals,—the grave,—they are able to add field to field, and power to power, until they become entirely too strong for that society which is made up of those whose plans are limited by a single life."

We are of the opinion that the court below erred in overruling the demurrers to the pleas.

The judgment of the circuit court is reversed, and the cause is remanded to that court, with directions to sustain the demurrers to the pleas, and for further proceedings in accordance with the views here expressed.

*Judgment reversed.*⁹¹

91—*Contra*: *Rafferty v. Buffalo City Gas Co.*, 37 App. Div. (N. Y.) 618.

CHAPTER II

THE SHERMAN ANTI-TRUST ACT

SECTION 1

THE ACT AND ITS CONSTITUTIONALITY.¹

“An Act to protect trade and commerce against unlawful restraints and monopolies.” (Act of July 2, 1890, 26 Stat. 209.)

Section 1. Every contract combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

1—It is not proposed in this case book to attempt to cover the subject of what contracts or combinations relate to “trade and commerce among the several states, or with foreign nations,” as distinguished from intra-state commerce.

That is left to the course on Constitutional Law which now usually deals with the distinction between

intra-state and interstate commerce.

Many of the cases under the Sherman Act deal exhaustively with this distinction as it applies to contracts and combinations alleged to be in restraint of trade contrary to the Sherman Act—notably: *United States v. E. C. Knight Co.*, 156 U. S. 1; *Addyston Pipe and Steel Co. v. United States*, 175 U. S. 211.

Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

Sec. 5. Whenever it shall appear to the court before which any proceeding under section 4 of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

Sec. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section 1 of this act, and being in the course of transportation from one state to another, or to a foreign country, shall be forfeited to the United States,

and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

Sec. 8. That the word "person," or "persons" wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

UNITED STATES v. JOINT-TRAFFIC ASSOCIATION

(Supreme Court of United States, 1898. 171 U. S. 505.)

MR. JUSTICE PECKHAM.² * * * Upon the constitutionality of the act it is now earnestly contended that contracts in restraint of trade are not necessarily prejudicial to the security or welfare of society, and that congress is without power to prohibit generally all contracts in restraint of trade, and the effort to do this invalidates the act in question. It is urged that it is for the court to decide whether the mere fact that a contract or arrangement, whatever its purpose or character, may restrain trade in some degree, renders it injurious or prejudicial to the welfare or security of society; and, if the court be of opinion that such welfare or security is not prejudiced by a contract of that kind, then congress has no power to prohibit it, and the act must be declared unconstitutional. It is claimed that the act can be supported only as an exercise of the police power, and that the constitutional guaranties furnished by the fifth amendment secure to all persons freedom

²—Only that part of the opinion of the court is given which relates to the constitutionality of the Sherman Anti-Trust Act.

in the pursuit of their vocations and the use of their property, and in making such contracts or arrangements as may be necessary therefor. In dwelling upon the far-reaching nature of the language used in the act as construed in the case mentioned, counsel contend that the extent to which it limits the freedom and destroys the property of the individual can scarcely be exaggerated, and that ordinary contracts and combinations, which are at the same time most indispensable, have the effect of somewhat restraining trade and commerce, although to a very slight extent, but yet, under the construction adopted, they are illegal.

As examples of the kinds of contracts which are rendered illegal by this construction of the act, the learned counsel suggest all organizations of mechanics engaged in the same business for the purpose of limiting the number of persons employed in the business, or of maintaining wages; the formation of a corporation to carry on any particular line of business by those already engaged therein; a contract of partnership or of employment between two persons previously engaged in the same line of business; the appointment by two producers of the same person to sell their goods on commission; the purchase by one wholesale merchant of the product of two producers; the lease or purchase by a farmer, manufacturer, or merchant of an additional farm, manufactory, or shop; the withdrawal from business of any farmer, merchant, or manufacturer; a sale of the good will of a business with an agreement not to destroy its value by engaging in similar business; and a covenant in a deed restricting the use of real estate. It is added that the effect of most business contracts or combinations is to restrain trade in some degree.

This makes quite a formidable list. It will be observed, however, that no contract of the nature above described is now before the court, and there is some embarrassment in assuming to decide herein just how far the act goes in the direction claimed. Nevertheless, we might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same

person to sell their goods on commission was a matter in any degree in restraint of trade.

We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer, or merchant of an additional farm, manufactory, or shop, or the withdrawal from business of any farmer, merchant, or manufacturer, restrained commerce or trade, within any legal definition of that term; and the sale of a good will of a business with an accompanying agreement not to engage in a similar business was instanced in the *Trans-Missouri Case* as a contract not within the meaning of the act, and it was said that such a contract was collateral to the main contract of sale, and was entered into for the purpose of enhancing the price at which the vendor sells his business. The instances cited by counsel have, in our judgment, little or no bearing upon the question under consideration. In *Hopkins v. U. S.* (decided at this term), 19 Sup. Ct. 40, we have said that the statute applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce, and that to treat the act as condemning all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. The effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce. We also repeat what is said in the case above cited, that "the act of congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and, possibly, to restrain it." To suppose, as is assumed by counsel, that the effect of the decision in the *Trans-Missouri Case* is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption, and one not called for or

justified by the decision mentioned, or by any other decision of this court.

The question really before us is whether congress, in the exercise of its right to regulate commerce among the several states, or otherwise, has the power to prohibit, as in restraint of interstate commerce, a contract or combination between competing railroad corporations, entered into and formed for the purpose of establishing and maintaining interstate rates and fares for the transportation of freight and passengers on any of the railroads parties to the contract or combination, even though the rates and fares thus established are reasonable. Such an agreement directly affects, and of course is intended to affect, the cost of transportation of commodities; and commerce consists, among other things, of the transportation of commodities, and, if such transportation be between states, it is interstate commerce. The agreement affects interstate commerce by destroying competition, and by maintaining rates above what competition might produce.

If it did not do that its existence would be useless, and it would soon be rescinded or abandoned. Its acknowledged purpose is to maintain rates, and, if executed, it does so. It must be remembered, however, that the act does not prohibit any railroad company from charging reasonable rates. If, in the absence of any contract or combination among the railroad companies, the rates and fares would be less than they are under such contract or combination, that is not by reason of any provision of the act which itself lowers rates, but only because the railroad companies would, as it is urged, voluntarily and at once inaugurate a war of competition among themselves, and thereby themselves reduce their rates and fares.

Has not congress, with regard to interstate commerce, and in the course of regulating it, in the case of railroad corporations, the power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition? We think it has.

As counsel for the Traffic Association has truly said, the ordinary highways on land have generally been established and maintained by the public. When the matter of the building of railroads as highways arose, a question was presented whether

the state should itself build them or permit others to do it. The state did not build them, and, as their building required, among other things, the appropriation of land, private individuals could not enforce such appropriation without a grant from the state.

The building and operation of a railroad thus required a public franchise. The state would have had no power to grant the right of appropriation unless the use to which the land was to be put was a public one. Taking land for railroad purposes is a taking for a public purpose, and the fact that it is taken for a public purpose is the sole justification for taking it at all. The business of a railroad carrier is of a public nature, and in performing it the carrier is also performing to a certain extent a function of government, which, as counsel observed, requires them to perform the service upon equal terms to all. This public service—that of transportation of passengers and freight—is a part of trade and commerce, and when transported between states such commerce becomes what is described as interstate, and comes, to a certain extent, under the jurisdiction of congress by virtue of its power to regulate commerce among the several states.

Where the grantees of this public franchise are competing railroad companies for interstate commerce, we think congress is competent to forbid any agreement or combination among them by means of which competition is to be smothered.

Although the franchise, when granted by the state, becomes by the grant the property of the grantee, yet there are some regulations respecting the exercise of such grants which congress may make under its power to regulate commerce among the several states. This will be conceded by all, the only question being as to the extent of the power.

We think it extends at least to the prohibition of contracts relating to interstate commerce, which would extinguish all competition between otherwise competing railroad corporations, and which would in that way restrain interstate trade or commerce. We do not think that when the grantees of this public franchise are competing railroads seeking the business of transportation of men and goods from one state to another, that ordinary freedom of contract in the use and management of their property requires the right to combine as one con-

solidated and powerful association for the purpose of stifling competition among themselves, and of thus keeping their rates and charges higher than they might otherwise be under the laws of competition. And this is so even though the rates provided for in the agreement may, for the time, be not more than are reasonable. They may easily, and at any time, be increased. It is the combination of these large and powerful corporations, covering vast sections of territory, and influencing trade throughout the whole extent thereof, and acting as one body in all the matters over which the combination extends, that constitutes the alleged evil, and in regard to which, so far as the combination operates upon and restrains interstate commerce, congress has power to legislate and to prohibit.

The prohibition of such contracts may, in the judgment of congress, be one of the reasonable necessities for the proper regulation of commerce, and congress is the judge of such necessity and propriety, unless, in case of a possible gross perversion of the principle, the courts might be applied to for relief.

The cases cited by the respondents' counsel in regard to the general constitutional right of the citizen to make contracts relating to his lawful business are not inconsistent with the existence of the power of congress to prohibit contracts of the nature involved in this case. The power to regulate commerce has no limitation other than those prescribed in the constitution. The power, however, does not carry with it the right to destroy or impair those limitations and guaranties which are also placed in the constitution, or in any of the amendments to that instrument. *Navigation Co. v. U. S.*, 148 U. S. 312-336; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447-479.

Among these limitations and guaranties counsel refer to those which provide that no person shall be deprived of life, liberty, or property without due process of law, and that private property shall not be taken for public use without just compensation. The latter limitation is, we think, plainly irrelevant.

As to the former, it is claimed that the citizen is deprived of his liberty without due process of law when, by a general

statute, he is arbitrarily deprived of the right to make a contract of the nature herein involved.

The case of *Allgeyer v. Louisiana*, 165 U. S. 578, is cited as authority for the statement concerning the right to contract. In speaking of the meaning of the word "liberty," as used in the fourteenth amendment to the constitution, it was said in that case to include, among other things, the liberty of the citizen to pursue any livelihood or vocation, and for that purpose to enter into all contracts which might be proper, necessary, and essential to his carrying out those objects to a successful conclusion.

We do not impugn the correctness of that statement. The citizen may have the right to make a proper (that is, a lawful) contract, one which is also essential and necessary for carrying out his lawful purposes. The question which arises here is whether the contract is a proper or lawful one, and we have not advanced a step towards its solution by saying that the citizen is protected by the fifth, or any other, amendment, in his right to make proper contracts to enable him to carry out his lawful purposes. We presume it will not be contended that the court meant, in stating the right of the citizen "to pursue any livelihood or vocation," to include every means of obtaining a livelihood, whether it was lawful or otherwise. Precisely how far a legislature can go in declaring a certain means of obtaining a livelihood unlawful, it is unnecessary here to speak of. It will be conceded it has power to make some kinds of vocations and some methods of obtaining a livelihood unlawful, and in regard to those the citizen would have no right to contract to carry them on.

Congress may restrain individuals from making contracts under certain circumstances and upon certain subjects. *Frisbie v. U. S.*, 157 U. S. 160, 15 Sup. Ct. 586.

Notwithstanding the general liberty of contract which is possessed by the citizen under the constitution, we find that there are many kinds of contracts which, while not in themselves immoral or mala in se, may yet be prohibited by the legislation of the states, or, in certain cases, by congress. The question comes back whether the statute under review is a legitimate exercise of the power of congress over interstate commerce, and a valid regulation thereof. The question is,

for us, one of power only, and not of policy. We think the power exists in congress, and that the statute is therefore valid.

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ADDYSTON PIPE & STEEL CO. v. UNITED STATES

(Supreme Court of United States, 1899. 175 U. S. 211.)

MR. JUSTICE PECKHAM.³ * * * Assuming, for the purpose of the argument, that the contract in question herein does directly and substantially operate as a restraint upon and as a regulation of interstate commerce, it is yet insisted by the appellants at the threshold of the inquiry that by the true construction of the Constitution, the power of Congress to regulate interstate commerce is limited to its protection from acts of interference by state legislation or by means of regulations made under the authority of the state by some political subdivision thereof, including also congressional power over common carriers, elevator, gas, and water companies, for reasons stated to be peculiar to such carriers and companies, but that it does not include the general power to interfere with or prohibit private contracts between citizens, even though such contracts have interstate commerce for their object, and result in a direct and substantial obstruction to or regulation of that commerce.

This argument is founded upon the assertion that the reason for vesting in Congress the power to regulate commerce was to insure uniformity of regulation against conflicting and discriminating state legislation; and the further assertion that the Constitution guarantees liberty of private contract to the citizen, at least upon commercial subjects, and to that extent the guaranty operates as a limitation on the power of Congress to regulate commerce. Some remarks are quoted from the opinions of Chief Justice MARSHALL, in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23, and *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678; and from the opinions of other justices of this court in the cases of *The State Freight Tax*, 15 Wall. 275,

3—Only so much of the opinion is given as relates to the constitutionality of the Sherman Anti-Trust Act.

sub nom. Philadelphia & R. R. Co. v. Pennsylvania, 21 L. ed. 161; Dubuque & S. C. R. Co. v. Richmond, 19 Wall. 589, 22 L. ed. 176; Welton v. Missouri, 91 U. S. 280, 23 L. ed. 349; Mobile County v. Kimball, 102 U. S. 697, 26 L. ed. 239; and Kidd v. Pearson, 128 U. S. at 21, 32 L. ed. 350, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6, all of which are to the effect that the object of vesting in Congress the power to regulate interstate commerce was to insure uniformity of regulation against conflicting and discriminating state legislation. The further remark is quoted from Dubuque & S. C. R. Co. v. Richmond, 19 Wall. 589, 22 L. ed. 176, that the power of Congress to regulate commerce was never intended to be exercised so as to interfere with private contracts not designed at the time they were made to create impediments to such commerce. It is added that the proof herein shows that the contract in this case was not so designed.

It is undoubtedly true that among the reasons, if not the strongest reason, for placing the power in Congress to regulate interstate commerce, was that which is stated in the extracts from the opinions of the court in the cases above cited.

The reasons which may have caused the framers of the Constitution to repose the power to regulate interstate commerce in Congress do not, however, affect or limit the extent of the power itself.

In *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23, the power was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution.

Under this grant of power to Congress, that body, in our judgment, may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce. (And when we speak of interstate we also include in our meaning foreign commerce.) We do not assent to the correctness of the proposition that the constitutional guaranty of liberty to the individual to enter into private contracts limits the power of Congress and prevents it from legislating upon the subject of contracts of the class mentioned.

The power to regulate interstate commerce is, as stated by Chief Justice MARSHALL, full and complete in Congress, and there is no limitation in the grant of the power which excludes private contracts of the nature in question from the jurisdiction of that body. Nor is any such limitation contained in that other clause of the Constitution which provides that no person shall be deprived of life, liberty, or property, without due process of law. It has been held that the word "liberty," as used in the Constitution, was not to be confined to the mere liberty of person, but included, among others, a right to enter into certain classes of contracts for the purpose of enabling the citizen to carry on his business. *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832; *United States v. Joint Traffic Asso.* 171 U. S. 505, 572, 43 L. ed. 259, 288. But it has never been, and in our opinion ought not to be, held that the word included the right of an individual to enter into private contracts upon all subjects, no matter what their nature and wholly irrespective (among other things) of the fact that they would, if performed, result in the regulation of interstate commerce and in the violation of an act of Congress upon that subject. The provision in the Constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above nature while in the exercise of its constitutional right to regulate commerce among the states. On the contrary, we think the provision regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the Constitution, and that the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally, and collaterally, regulate to a greater or less degree commerce among the states.

We cannot so enlarge the scope of the language of the Constitution regarding the liberty of the citizen as to hold that it includes or that it was intended to include a right to make a contract which in fact restrained and regulated interstate commerce, notwithstanding Congress, proceeding under the constitutional provision giving to it the power to regulate that commerce, had prohibited such contracts.

While unfriendly or discriminating legislation of the sev-

eral states may have been the chief cause for granting to Congress the sole power to regulate interstate commerce, yet we fail to find in the language of the grant any such limitation of that power as would exclude Congress from legislating on the subject and prohibiting those private contracts which would directly and substantially, and not as a mere incident, regulate interstate commerce.

If certain kinds of private contracts do directly, as already stated, limit or restrain, and hence regulate interstate commerce, why should not the power of Congress reach those contracts just the same as if the legislation of some state had enacted the provisions contained in them? The private contracts may in truth be as far reaching in their effect upon interstate commerce as would the legislation of a single state of the same character.

In *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, it was said by Mr. Justice BREWER, speaking for the court: "It is curious to note the fact that in a large proportion of the cases in respect to interstate commerce brought to this court the question presented was of the validity of state legislation in its bearings upon interstate commerce, and the uniform course of decision has been to declare that it is not within the competency of a state to legislate in such a manner as to obstruct interstate commerce. If a state, with its recognized power of sovereignty, is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that state has a power which the state itself does not possess?"

What sound reason can be given why Congress should have the power to interfere in the case of the state, and yet have none in the case of the individual? Commerce is the important subject of consideration, and anything which directly obstructs and thus regulates that commerce which is carried on among the states, whether it is state legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce.

The power of Congress over this subject seems to us much more important and necessary than the liberty of the citizen to enter into contracts of the nature above mentioned, free from the control of Congress, because the direct results of such

contracts might be the regulation of commerce among the states, possibly quite as effectually as if a state had passed a statute of like tenor as the contract.

The liberty of contract in such case would be nothing more than the liberty of doing that which would result in the regulation, to some extent, of a subject which, from its general and great importance, has been granted to Congress as the proper representative of the nation at large. Regulation, to any substantial extent, of such a subject by any other power than that of Congress, after Congress has itself acted thereon, even though such regulation is effected by means of private contracts between individuals or corporations, is illegal, and we are unaware of any reason why it is not as objectionable when attempted by individuals as by the state itself. In both cases it is an attempt to regulate a subject which, for the purpose of regulation, has been, with some exceptions, such as are stated in *Mobile County v. Kimball*, 102 U. S. 691, 697, 26 L. ed. 238, 239; *Morgan's L. & T. R. & S. S. Co. v. Louisiana*, 118 U. S. 455, 465, 30 L. ed. 237, 242; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823; *Western U. Tele. Co. v. James*, 162 U. S. 650, 655, 40 L. ed. 1105, 1106, exclusively granted to Congress, and it is essential to the proper execution of that power that Congress should have jurisdiction as much in the one case as in the other.

It is, indeed, urged that to include private contracts of this description within the grant of this power to Congress is to take from the states their own power over the subject, and to interfere with the liberty of the individual in a manner and to an extent never contemplated by the framers of the Constitution, and not fairly justified by any language used in that instrument. If Congress has not the power to legislate upon the subject of contracts of the kind mentioned, because the constitutional provision as to the liberty of the citizen limits, to that extent, its power to regulate interstate commerce, then it would seem to follow that the several states have that power, although such contracts relate to interstate commerce, and, more or less, regulate it. If neither Congress nor the state legislatures have such power, then we are brought to the somewhat extraordinary position that there is no authority, state

or national, which can legislate upon the subject of or prohibit such contracts. This cannot be the case.

If it should be held that Congress has no power and the state legislatures have full and complete authority to thus far regulate interstate commerce by means of their control over private contracts between individuals or corporations, then the legislation of the different states might and probably would differ in regard to the matter, according to what each state might regard as its own particular interest. One state might condemn all kinds of contracts of the class described, while another might permit the making of all of them, while still another might permit some and prohibit others, and thus great confusion would ensue, and it would be difficult in many cases to know just what law was applicable to any particular contract regarding and regulating interstate commerce. At the same time contracts might be made between individuals or corporations of such extent and magnitude as to seriously affect commerce among the states. These consequences would seemingly necessarily follow if it were decided that the state legislatures had control over the subject to the extent mentioned.

It is true, so far as we are informed, that no state legislature has heretofore authorized by affirmative legislation the making of contracts upon the matter of interstate commerce of the nature now under discussion. Nor has it, in terms, condemned them. The reason why no state legislation upon the subject has been enacted has probably been because it was supposed to be a subject over which state legislatures had no jurisdiction. If it should be decided that they have, then the course of legislation of the different states on this subject would probably be as varied as we have already indicated.

On the other hand, if it be true that in no event could a state legislature enact a law affirmatively authorizing such contracts (even if Congress had no jurisdiction over the subject), because in so doing it would to a greater or less extent itself thereby, though indirectly, regulate interstate commerce, then the question whether such contracts were legal without legislative sanction would depend upon the decisions of the various state courts having jurisdiction in the cases, and, in that event, as the same question might arise in different states, there would be great probability of inconsistent and contra-

dictory decisions among the courts of the different states, and that, too, upon questions of contracts amounting to the regulation of interstate commerce. It is true that under our system of government there are numerous subjects over which the states have exclusive jurisdiction, resulting in the enactment of different laws upon the same subject in various states, and also in varying and inconsistent judicial judgments in the different states upon the same subject. That condition has never been regarded as an end in itself desirable. It undoubtedly results in some confusion as to the law applicable to the particular case, and in many instances thereby increases the cost and renders doubtful the result of the litigation arising under such circumstances. They are results and the necessary accompaniment of the division of sovereignty between the states on the one hand and the Federal government on the other, and yet the enormous and inestimable benefits arising from the existence of separate, independent, and sovereign states have completely submerged the comparatively minor evils of inconsistent judgments and different laws upon many of the subjects over which the states have exclusive jurisdiction. But upon the matter of interstate and foreign commerce and the proper regulation thereof, the subject being not alone national but international in its character, the great importance of having but one source for the law which regulates that commerce throughout the length and breadth of the land cannot, in our opinion, be overestimated. Each state in that event would have complete jurisdiction over the commerce which was wholly within its own borders, while the jurisdiction of Congress, under the provisions of the Constitution, over interstate commerce would be paramount, and would include therein jurisdiction over contracts of the nature we have been discussing.

The remark in *Dubuque & S. C. R. Co. v. Richmond*, 19 Wall. 589, 22 L. ed. 176, that it was never intended that the power of Congress should be exercised so as to interfere with private contracts not designed at the time they were made to create impediments to interstate commerce, when read in connection with the facts stated in the report, is entirely sound. It therein appears that a contract had been made between the parties, as to the erection of an elevator and the business to be done

by it, which contract was valid when made. Subsequently Congress passed acts relating to the construction of bridges over rivers and streams and authorizing railroads to carry passengers on their way from one state to another. The railroad company, becoming tired of its contract with the elevator company, desired to take advantage of this legislation, and contended that under it the contract which it had theretofore made with the elevator company became void as an obstacle to or a regulation of commerce. The court held that contracts which were valid when made continue valid and capable of enforcement so long, at least, as peace lasts between the governments of the contracting parties, notwithstanding a change in the condition of business which originally led to their creation. It was then added that it never was intended that the power of Congress should be exercised so as to interfere with private contracts not designed at the time they were made to create impediments to interstate commerce.

There is no intimation in this remark that Congress has no power to legislate regarding those contracts which do directly regulate and restrain interstate commerce. The inference is quite the reverse, and it is plain that the case assumes if private contracts when entered into do directly interfere with and regulate interstate commerce, Congress had power to condemn them. If the necessary, direct, and immediate effect of the contract be to violate an act of Congress and also to restrain and regulate interstate commerce, it is manifestly immaterial whether the design to so regulate was or was not in existence when the contract was entered into. In such case the design does not constitute the material thing. The fact of a direct and substantial regulation is the important part of the contract, and, that regulation existing, it is unimportant that it was not designed.

Where the contract affects interstate commerce only incidentally, and not directly, the fact that it was not designed or intended to affect such commerce is simply an additional reason for holding the contract valid and not touched by the act of Congress. Otherwise the design prompting the execution of a contract pertaining to and directly affecting, and more or less regulating, interstate commerce, is of no importance. We conclude that the plain language of the grant to Congress

of power to regulate commerce among the several states includes power to legislate upon the subject of those contracts in respect to interstate or foreign commerce which directly affect and regulate that commerce, and we can find no reasonable ground for asserting that the constitutional provision as to the liberty of the individual limits the extent of that power, as claimed by the appellants. We therefore think the appellants have failed in their contention upon this branch of the subject.

* * * * *

STANDARD OIL COMPANY v. UNITED STATES

(Supreme Court of United States, 1910. 221 U. S. 1.)

MR. CHIEF JUSTICE WHITE.⁴ * * * Many arguments are pressed in various forms of statement which in substance amount to contending that the statute cannot be applied under the facts of this case without impairing rights of property and destroying the freedom of contract or trade which is essentially necessary to the well-being of society, and which, it is insisted, is protected by the constitutional guaranty of due process of law. But the ultimate foundation of all these arguments is the assumption that reason may not be resorted to in interpreting and applying the statute, and therefore that the statute unreasonably restricts the right to contract, and unreasonably operates upon the right to acquire and hold property. As the premise is demonstrated to be unsound by the construction we have given the statute, of course the propositions which rest upon that premise need not be further noticed.

So far as the arguments proceed upon the conception that, in view of the generality of the statute, it is not susceptible of being enforced by the courts because it cannot be carried out without a judicial exertion of legislative power, they are clearly unsound. The statute certainly generically enumerates

⁴—Only so much of the opinion is given as relates to the constitutionality of the Sherman Anti-Trust Act.

the character of acts which it prohibits and the wrong which it was intended to prevent. The propositions therefore insist that, consistently with the fundamental principles of due process of law, it never can be left to the judiciary to decide whether, in a given case, particular acts come within a generic statutory provision. But to reduce the propositions, however, to this, their final meaning, makes it clear that in substance they deny the existence of essential legislative authority, and challenge the right of the judiciary to perform duties which that department of the government has exerted from the beginning. This is so clear as to require no elaboration. Yet, let us demonstrate that which needs no demonstration, by a few obvious examples. Take, for instance, the familiar cases where the judiciary is called upon to determine whether a particular act or acts are within a given prohibition, depending upon wrongful intent. Take questions of fraud. Consider the power which must be exercised in every case where the courts are called upon to determine whether particular acts are invalid which are, abstractly speaking, in and of themselves valid, but which are asserted to be invalid because of their direct effect upon interstate commerce.

* * * * *

SECTION 2

CONTRACTS ACCOMPANYING THE SALE OF A BUSINESS

CINCINNATI, P. B. S. & P. PACKET CO. v. BAY

(Supreme Court of United States, 1906. 200 U. S. 179.)

MR. JUSTICE HOLMES delivered the opinion of the court:⁵

This is an action upon a contract, brought by the defendants in error to recover an instalment of money due by its terms. A judgment in their favor was sustained by the supreme court of the state, although the petition in error to that court set up that the contract was illegal under the act of Congress of July 2, 1890, chap. 647. 26 Stat. at L. 209, U. S.

5—Only the opinion of the court is given.

Comp. Stat. 1901, p. 3200. No opinion was delivered, but a certificate that this objection was relied upon, and that it necessarily was considered, was made part of the record by that court. Therefore the present writ of error properly was allowed. The record shows that the question was raised, and the certificate shows that it was not treated as having been raised too late under the local procedure,—a point upon which the state court is the judge. It is enough that the Federal question was raised and necessarily decided by the highest court of the state. *Farmers' & M. Ins. Co. v. Dobney*, 189 U. S. 301, 47 L. ed. 821.

The contract was an indenture between the Portsmouth & Pomeroy Packet Company, George W. and William Bay, of the first part, and the Cincinnati, Portsmouth, Big Sandy, & Pomeroy Packet Company, of the second part. By this instrument the parties of the first part sell to the latter two steamers, two deck barges, two coal flats, and \$500 in the stock of the Coney Island Wharf Boat Company, for \$30,500, to be paid as therein provided. The party of the second part also agrees to pay to the Bays \$3,600 annually in advance for five years, provided, however, that in case of opposition to its boats by other boats running from Cincinnati to Portsmouth, Ohio, or to points above Portsmouth, not including points above Syracuse, Ohio, causing it to carry freight and passengers at certain exceedingly low rates, the time of payment of the instalments shall be postponed until the opposition has ceased. It is further agreed that if the opposition continues for two years without interruption, and no annual payment be made, the Bays may cancel the agreement.

"It is also agreed as a part of the consideration of this agreement" that for five years the parties of the first part, or either of them, shall not be "engaged in running or in operating, or in any way be interested in any freight and passenger packet or business, or either of them, at and from Cincinnati, Ohio, to Portsmouth, Ohio, and intermediate points; nor at and from Portsmouth, Ohio, to Cincinnati, Ohio, and intermediate points; nor at and from Syracuse, Ohio, or points between Syracuse and Portsmouth, Ohio, to or for points below Portsmouth, Ohio," with a qualification as to the towing and barge business, so long as it does not interfere with the

other party's freight and passenger business from Portsmouth to Cincinnati. "It is also understood in this agreement that the party of the second part will maintain the rates charged by the parties of the first part on business above Portsmouth, Ohio, said rates, however, never to exceed railroad rates between said points." The last-mentioned covenants, set forth in this paragraph, are especially relied upon as making the contract illegal, as in restraint of trade. The previously mentioned suspension of instalments in case of opposition rising to a certain height also is referred to as a combination to aid the purchaser in getting a monopoly of river trade between Portsmouth and Cincinnati, including, it is said, some Kentucky ports.

It might be enough, perhaps, to answer the whole contention, that it does not appear on the record that the contract necessarily contemplated commerce between the states. It would be an extravagant consequence to draw from *Hanley v. Kansas City Southern R. Co.*, 187 U. S. 617, 47 L. ed. 333,—a case of a state attempting to fix rates over a railroad route passing outside its limits,—that the contract was within the Sherman act because the boats referred to might sail over soil belonging to Kentucky in passing between two Ohio points. It may be noticed further that Ohio equally has jurisdiction on the river. *Wedding v. Meyler*, 192 U. S. 573, 48 L. ed. 570, 66 L. R. A. 833. A contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts. Technically, perhaps, there might be some trouble in saying that the supreme court of Ohio did not decide the case on the ground that the illegality was not made out as matter of fact.

But we do not like to put our decision upon technical reasoning where there is at least a fair surmise that such reasoning does not meet the realities of the case. We will suppose, then, that the contract does not leave commerce among the states untouched. But even on this supposition it is manifest that interference with such commerce is insignificant and incidental, and not the dominant purpose of the contract, if it actually was thought of at all. The route mentioned is between Ohio ports. The contract, in what it especially contemplates, is a domestic contract, and, so far as it is so, is shown

to be valid under the local law by the decision of the Ohio court. The chief and visible object of its provisions has nothing to do with commerce among the states. That which suspends payment of instalments in case of very serious opposition is security against a losing bargain, not a combination to gain a monopoly. The withdrawal of the vendors from opposition for five years is the ordinary incident of the sale of a business and good will.

It is argued, to be sure, that the last-mentioned covenant is independent and not connected with the sale of the vessels. The contrary is manifest as a matter of good sense, and is proved even technically by the words "it is also agreed as a part of the consideration of this agreement." By these words the covenant not to do business between Cincinnati and Portsmouth for five years is imported into the sale of the ships, and made one of the conventional inducements of the purchase. The price is paid not for the vessels alone, but for the vessels with the covenant. So, still more clearly, the parallel instalments for five years are paid for the covenant, at least in part. It is said that there is no sale of good will. But the covenant makes the sale. Presumably all that there was to sell, beside certain instruments of competition, was the competition itself, and the purchasers did not want the vendors' names.

This being our view of the covenant in question, whatever differences of opinion there may have been with regard to the scope of the act of July 2, 1890, there has been no intimation from anyone, we believe that such a contract, made as part of the sale of a business, and not as a device to control commerce, would fall within the act. On the contrary, it has been suggested repeatedly that such a contract is not within the letter or spirit of the statute (*United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 329, 41 L. ed. 1007, 1023; *United States v. Joint Traffic Asso.* 171 U. S. 505, 568, 43 L. ed. 259, 287), and it was so decided in the case of a patent (*E. Bement & Sons v. National Harrow Co.*, 186 U. S. 70, 92, 46 L. ed. 1058, 1069). It would accomplish no public purpose, but simply would provide a loophole of escape to persons inclined to elude performance of their undertaking, if the sale of a business and temporary withdrawal of the seller, necessary in order to give the sale effect, were to be declared illegal in every case where

a nice scrutiny could discover that the covenant possibly might reach beyond the state line. We are of opinion that the agreement before us is not made illegal by either of the provisions thus far discussed.

It only remains to say a word as to the agreement to maintain rates. This is a covenant by the purchaser, the plaintiff in error. It is not the covenant sued upon. It is not declared to enter into the consideration of the sale. If necessary, we should be astute to avoid allowing a party to escape from his just and substantially legal undertaking on such a ground. The argument on the other side requires us to import a subordinate undertaking of the buyer into the consideration for that which was the consideration of his debt, and, in that roundabout way, to make the debt unlawful. We shall not go into such niceties beyond noticing that they are not encouraged by the cases. *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 22 L. ed. 315; *Bank of Australasia v. Breillat*, 6 Moore, P. C. C. 152, 201; *Pigot's Case*, 11 Coke, 26b, 27b. The plaintiff in error did business between Cincinnati and Syracuse, Ohio, and the rates referred to must be assumed to be rates within those points. If the covenant had any direct bearing on commerce with another state, what we have said sufficiently explains why we deem it insufficient to make the whole agreement void.

*Judgment affirmed.*⁶

SHAWNEE COMPRESS CO. v. ANDERSON

(Supreme Court of United States, 1908. 209 U. S. 423.)⁷

Statement by Mr. Justice McKENNA:

This suit was brought in the district court of the county of Lincoln, territory of Oklahoma, by appellees as stockholders of the Shawnee Compress Company against appellants, to can-

⁶—See *Espenson v. Koepke*, 93 Minn. 278; *Gates v. Hooper*, 39 S. W. 1079; *Erwin v. Hayden*, 43 S. W. 610.

⁷—Names and arguments of counsel omitted.

eel a lease made by the Shawnee Compress Company to the Gulf Compress Company.

The original petition alleged that the compress companies were respectively corporations of Oklahoma and the state of Alabama; that the plaintiffs, appellees here, were minority stockholders of the Shawnee Company; that certain of the stockholders of the Shawnee Company, claiming to be its officers, "conceived the idea of leasing the entire property and business of said company, together with its good will and the right to the business thereof to said defendant, Gulf Compress Company, a foreign corporation;" that subsequently the same stockholders, claiming to be the directors of the corporation, in certain meetings and by certain resolutions, executed the purpose. These meetings were alleged to be invalid as not being in conformity with the by-laws, and that the proceedings therein were "wholly illegal and beyond the powers and authority of the said stockholders and directors of said corporation;" that the corporation was organized to construct and operate a cotton compress in the city of Shawnee, and that its officers and stockholders were not authorized to execute a lease for a period of years, vesting in another and foreign corporation the rights, duties, and business of the company, and that the lease was void as against the rights of plaintiffs, being minority stockholders of the company. A copy of the lease was attached to the petition.

The petition was amended, making the allegations somewhat fuller, and alleged that appellants Stubbs and Beatty, who assumed to act respectively as president and secretary of the company, and certain other stockholders who joined with them in the negotiation of the lease, were induced thereto by certain advantages personal to themselves, and not by the interest of the company. It was also alleged that the "exigencies of the business" of the company did not demand or justify the lease, and that its revenues for the season 1904-1905, over and above taxes and insurance, notwithstanding negligent and incompetent management, were \$7,485.89; and, plaintiffs expressed the belief, could be made greater for the years covered by the lease. It was alleged that the Gulf Compress Company was in the business of leasing and operating competing compresses for the purpose of monopolizing, as far as possible, the

business of compressing cotton in a large portion, if not all, the cotton-raising districts of the United States, and that the lease was procured from the Shawnee Company in pursuance of said scheme, and other leases of other compresses were also secured for like purposes, and that the Gulf Company is, in its operation and method of conducting business, a trust, combine, and conspiracy, in restraint of trade and commerce, in violation of the Federal anti-trust law and the anti-trust law of the territory of Oklahoma, and that it is the design of the Gulf Compress Company to increase the charge of compressing cotton, and that it will be able to enforce such charges by reason of the fact that it will control all of the compresses in the territory.

There was a demurrer to the petition, which was overruled. An answer was then filed, which in detail asserted the validity of the proceedings preceding the execution of the lease; that the company was indebted in the sum of \$17,250,—\$6,000 to the Shawnee National Bank and \$11,250 to the Webb Press Company, Limited, which was past due; that its creditors were pressing for payment, and that the lease was necessary in order to procure money by which to pay the Shawnee Bank and to secure the extension of time on the indebtedness due the Webb Press Company; and that, for these reasons, the negotiations for the lease were entered into and the lease finally made. And it is alleged that the consideration paid was fair and reasonable and for the best interest of the stockholders of the Shawnee Company; that defendants could procure said second mortgage money in no other way; and that the property of the Shawnee Company would have been sold at a great sacrifice unless the lease had been made.

It is alleged that appellees are firms of cotton buyers, and, in order to obtain an unfair advantage over other buyers, have conspired together for the purpose of forming a monopoly of all the compresses in the territory and destroying competition in compressing; and, in order to carry out the conspiracy, have, for more than six months, endeavored to obtain a majority of the stock of the Shawnee Company; and, knowing that Beatty and Stubbs were involved and in need of money, have, in all ways, oppressed said Beatty and Stubbs to compel them to sell their stock to appellants for an inadequate con-

sideration, and conspired to compel the Shawnee Company, knowing it was involved and its demands pressing, to sell and convey its property to them for the inadequate consideration of \$25,000. And it is alleged that the lease was made to defeat such conspiracy. Other plans of the appellees to harrass the Shawnee Company are averred.

The case went to trial on the issues thus formed and resulted in a judgment for defendants (appellants here). The judgment recited that "the court having heard all the evidence offered . . . and being fully advised in the premises, finds for the defendants and against the plaintiffs that the allegations of the petition of plaintiffs are not supported by the law and the evidence."

A motion for a new trial was denied and the case was then taken to the supreme court of the territory, which court reversed the judgment of the court below, and the case was remanded to the district court, with instructions to that court to render judgment for plaintiffs in the case (appellees here) in accordance with the opinion of the supreme court, and the prayer of the amended petition.

MR. JUSTICE McKENNA, after making the foregoing statement, delivered the opinion of the court:

The supreme court of the territory, in its opinion, discussed only two of the questions urged upon its consideration; to wit: (1) the legal power of the Shawnee Compress Company to execute the lease; and (2) the purpose in its execution to secure a monopoly of the business of compressing cotton and to unlawfully restrict competition. Of the first the court said: "We find no express authority to lease set out in the articles of incorporation, but we are nevertheless of the opinion the weight of authority is that, when a strictly private corporation finds it cannot profitably continue operations, it may lawfully make a lease of its entire property for a term of years." [17 Okla. 237, 87 Pac. 316.]

The court cited cases, and continued: "It is only when such exigencies exist as necessitate or render appropriate such or similar action that the right can be exercised." And it was observed that while there was no special finding of fact "in that regard by the trial court, yet this feature must neces-

sarily have been considered, in the light of the evidence introduced at the trial, and the judgment based thereon."

The court further said that it found "ample authority in the record for the action;" and, following the rule "often reiterated," the court further said: "We must hold that, where the record contains some evidence to support the finding of the trial court," the judgment will not be disturbed.

The ruling sustaining the power of the Shawnee Company to execute the lease is attacked by appellees, but we do not find it necessary to express an opinion upon it, on account of the view we entertain of the second proposition.

In passing on the second proposition the supreme court decided adversely to the view taken by the trial court. The court therefore must either have considered that there was not some evidence supporting the conclusions of fact of the trial court, or must have deemed the principles of law which the trial court upheld were not sustained by its conclusion of fact. As our review, in the nature of things, is confined to determining whether the court below erred, it follows that our reviewing power under the circumstances is coincident with the authority to review possessed by the court below; and therefore we are confined, as was the court below, to determining whether there was some evidence supporting the findings, and whether the facts found were adequate to sustain the legal conclusions. *Southern Pine Lumber Co. v. Ward*, 208 U. S. 126, ante, 239, 28 Sup. Ct. Rep. 239.

The court, in its opinion, gives a summary of the pleadings, and states the salient points of the lease to be that it conveys all of the property of the Shawnee Company to the Gulf Company, that the Shawnee Company covenants that it will not, "directly or indirectly, engage in the compressing of cotton within 50 miles of any plant operated by the" Gulf Company, and that the Shawnee Company "agrees and pledges" to the Gulf Company "its good will, moral and real support, and that it, individually and collectively, will render the . . . [Gulf Company] every assistance in discouraging unreasonable and unnecessary competition." And from the evidence the court deduces the following conclusions:

"It further appears from the evidence at the trial that C. C. Hanson is the president of both the Atlanta Compress Com-

pany and the Gulf Compress Company, being a stockholder in each, and is the one who negotiated the lease in question. That the Atlanta Compress Company operates in the states of Alabama, Georgia, and Florida, and was organized and is owned and controlled solely by the carriers, for their benefit. That the board of directors and stockholders of said corporation are composed entirely of railroad officials. That the Atlanta Company controls the operation of twenty-five plants. That the Gulf Compress Company is a close corporation, chartered in Mobile, Alabama, and operating in the states of Alabama, Mississippi, Tennessee, Louisiana, Arkansas, Indian Territory, and Oklahoma, and controlling the operation of twenty-seven compresses in those states, located at various points therein. That none of the Gulf Compress Company's plants and the Atlanta Compress Company's compresses are operated at the same points.

"It is further disclosed by the evidence that the capital stock of the Gulf Company, as originally incorporated, was \$25,000, but that it has, within the past year, been increased to \$1,000,000, of which \$600,000 is treasury stock. That its field of operation has been rapidly extended from Alabama to all the cotton-growing territory; that it is at the present time engaged in the purchase or leasing of compresses at various points, and, as testified to by its president, is 'prepared to buy or lease, whichever proposition suits us best.' It appears from the evidence that negotiations conducted by Mr. Hanson with Stubbs and Beatty for the lease of the Shawnee plant were in pursuance of an effort to avoid, 'directly or indirectly, the possibility, if not probability, of unnecessary and unreasonable competition.'

"It is further disclosed by the testimony that the carrier pays for the compression of cotton, incorporating the cost thereof in its tariff. That tariffs for the hauling of cotton are established by the railroad as well as hauling districts or territories, within which the haul of cotton must be one way, or otherwise the higher rate, denominated the terminal rate, applies, rendering it unprofitable to ship to other than the established point in the hauling district."

And the court says that from these facts, and others referred to supporting them, it cannot be doubted that the object of

the Gulf Company and its allied corporation, the Atlanta Compress Company, "is to prevent competition in compression of cotton throughout the cotton-producing states." The court declared it to be its judgment that "not only is the enterprise in which the Gulf Compress Company is engaged an unlawful one, as now conducted, but the contract in question in this case, being made to further its objects and purposes, is void on the ground that it is in unreasonable restraint of trade and against public policy."

This conclusion is the direct antithesis of that drawn by the trial court, and we are brought to the inquiry, Is it justified?

The evidence cannot be given in detail, and we may say at the outset that there is no question as to its weight,—we are not confronted with conflicting testimonies. This branch of the case is constituted of the lease, principally of the testimony of one witness, the president of the Gulf Company, and of facts which are not disputed. The other testimony, a great deal of which is documentary, is mostly directed to the financial condition of the Shawnee Company as the inducement of the lease and to the proceedings taken to authorize its execution. There is also testimony directed against the purpose and motives of the appellees, and some tending to show that one of the officers and stockholders of the Shawnee Company had been loaned money by the president of the Gulf Company, whereby control of the Shawnee Company might be obtained and the lease authorized. This, however, we may put out of view.

It may be conceded that the evidence shows that the Shawnee Company was financially embarrassed, and its condition might have justified a lease of its property if that had been all it did. It, however, covenanted for its assistance in discouraging competition against its tenant, and bound itself not to "directly or indirectly engage in the compressing of cotton within 50 miles of any plant operated by the tenant." So far it covenanted to aid in the restraint of trade. It went out of the field of competition; it covenanted not to enter into that field again, and it pledged itself to render every assistance to prevent others from entering it. And it could not misunderstand the purpose for which its lease was solicited. It was told by the president of the Gulf Compress Company. In a

letter dated April 18, 1905, addressed to it by the president of that company, among other inducements, the following was expressed: "Our getting together on a lease proposed means the avoiding for each other, directly or indirectly, of the possibility, if not probability, of unnecessary competition." And what was the condition to which the Shawnee Company contributed? It appears from the letter just mentioned that the writer was president of two companies, which operated "forty odd compresses." Twenty-seven of them, it appears from the testimony, were operated by the Gulf Company, six only of which it owned. Most of the latter were acquired in the summer preceding the lease, and the president of the Gulf Company testified that "we are prepared to buy or lease, whichever proposition suits us best." To what object was the assembling in one ownership or management so many compresses, and keeping the means and declaring the purpose of acquiring more? The answer would seem to be obvious. The first effect would necessarily be the cessation of competition. If there was left a possibility of other compresses being constructed, it was made less by the power that could be opposed to them. The Gulf Company was a close corporation, which, starting in Alabama, rapidly extended from Alabama to all the cotton-growing territory. These are some of the points of the testimony which, taken in connection with other testimony, and with the terms of the lease and the restriction upon the Shawnee Company, support the conclusions of the supreme court of the territory. This case presents something more than the lease of property by the Shawnee Company, induced or made necessary by financial embarrassment. It presents something more than the acquisition by the Gulf Company of another compress,—of a mere addition to its business. It presents acts in aid of a scheme of monopoly. *Swift & Co. v. United States*, 196 U. S. 375, 49 L. ed. 518.

It does not appear whether the supreme court based its judgment upon the common law, the Sherman law, or the statutes of Oklahoma. The appellees insist that the law applicable to the case comes from all three sources. The Sherman law provides that "every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any territory of the United States or of the

District of Columbia . . . is hereby declared illegal." [26 Stat. at L. 209, chap. 647, § 3, U. S. Comp. Stat. 1901, p. 3201.] And it has been decided that not only unreasonable, but all direct restraints of trade are prohibited, the law being thereby distinguished from the common law. But it is contended that it was held in the *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, and in *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, that the sale of the good will of a business with an accompanying agreement not to engage in a similar business was not a restraint of trade within the meaning of the Sherman act.

Counsel has discussed with an affluent citation of cases the principle which regulates such contracts, and insists that the lease by the Shawnee Company conforms to such principle. The principle is well understood. The restraint upon one of the parties must not be greater than protection to the other party requires, and it needs no further explanation than is given in *Gibbs v. Baltimore Gas Co.* 130 U. S. 396, 32 L. ed. 979. The supreme court of the territory recognized the principle, but said: "Tested by the general principles applicable to contracts of this character, this agreement is far more extensive in its outlook and more onerous in its intent than is necessary to afford a fair protection to the lessee." And in this conclusion the statute of the territory may have had its influence. That statute makes void every contract by which anyone is restrained from exercising a lawful profession, trade, or business, except, however, that one who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or part thereof. *Wilson's Rev. & Anno. Stat.* §§ 819, 820. It is clear that the lease of the Shawnee Company to the Gulf Company does not literally comply with this requirement. Whether it can be limited by construction, as it is contended by appellants it can be, we need not decide. As written, it was, no doubt, considered with other considerations by the court in concluding that "the real, the veritable, purpose actuating the offices of the Gulf Compress Company, as disclosed by its plan of organization and mode of operation, and as manifested by the circumstances surrounding the conduct of its business and the results of its management by them

is, beyond reasonable question, to place within their power the control of the compress industry, by purchasing or leasing those plants which are advantageously located in each of the hauling districts or territories established by the carriers [railroads] in their cotton tariffs. Within certain boundaries the haul must be one certain way, and when the Gulf Company seizes the strategic point, under its leases, competition within that district is annihilated."

*Decree affirmed.*⁸

COMER v. BURTON-LINGO CO. et al.

(Texas Civil Appeals, 1900. 24 Tex. Civ. App. 251.)⁹

TEMPLETON, Associate Justice. The appellant, W. H. Comer, and one J. C. Morton were partners, and were engaged

8—See also *Darius Cole Transportation Co. v. White Star Line*, 186 Fed. 63.

Davis v. Booth & Co., 131 Fed. 31, at 37, per Severens, C. J.: "We think there is nothing in the anti-trust act which rendered unlawful the purchase by William Vernon Booth and his transfer to A. Booth & Co., of the plant of the Davis Fresh & Salt Fish Company, or which necessarily rendered invalid the agreement of the stockholders of the latter company [not to engage in a similar business in specified localities for a period of ten years], which was ancillary to the contract of sale. Nor can this conclusion be affected by the fact that A. Booth & Co. also purchased other plants and stocks to an extent that tended to create a power to monopolize the fish market. There is a clear distinction, which seems to be lost sight of in the argument here, between the aggregation of properties by purchase when the seller no

longer retains an interest in the property, and a combination of owners and properties under one management, where each owner's interest is continued in the combination. To this latter class belongs the case of *Merz Capsule Co. v. United States Capsule Co.* (C. C.), 67 Fed. 414, affirmed in 71 Fed. 787. It may be that the practice of acquiring by a single corporation, through purchase of a great number of single plants in several states, of power to control the market of a given commodity in a wide area of territory, may become injurious to the public; but, if so, it would seem that the limitations and the means for the restriction and correction required must be supplied by the law-making power, since the old law against forestalling the market has become obsolete."

See also *Cumors-McConnell Co. v. McConnell*, 140 Fed. 412.

9—Only the opinion of the court is given.

in business as dealers in lumber at Cleburne, Tex. On October 5, 1895, they sold their stock in trade, together with the good will of the business, to the appellees, and at the same time entered into a written agreement with the appellees, which agreement reads as follows: "That we shall go out of said business, and that we will not, and that neither of us shall, go back in said business, or lumber business, or engage to work for any one in said business, or lumber business, and that we will not sell lumber or any articles which we have been carrying and are now carrying in said business within the limits of the said city of Cleburne, Texas, for a period of ten years from this date; and we do hereby bind and obligate ourselves, and each of us, as a part of the consideration for the said amount which is to be paid us by said Burton-Lingo Co., Conway & Leeper, and A. C. Ford, to go out of, and not to engage in any manner for ourselves or for any one else in, the business we are now engaged in, and which is being bought from us by said Burton-Lingo Co., Conway & Leeper, and A. C. Ford, within the limits of the city of Cleburne, for a period of ten years from this date, with this exception: we, or either of us, have the right and privilege to buy an interest with the said Burton-Lingo Co., Conway & Leeper, and A. C. Ford in their said lumber business within the limits of said city of Cleburne, now or at any time in the future, provided either of said parties should see proper to sell any part or all of their business to us; and that we have the right to accept employment from either Burton-Lingo Co., Conway & Leeper, and A. C. Ford in the lumber business."

Thereafter the appellant resumed the lumber business at Cleburne, and the appellees, Burton-Lingo Co., Conway & Leeper, and A. C. Ford, brought this suit to restrain him from continuing such business and for damages. The appellant filed an answer, one paragraph of which reads as follows: "And, further answering herein, defendant says plaintiffs ought not to be allowed to recover against him on said written contract, because he says at the time he entered into said contract there were only four firms or companies in the city of Cleburne, Texas, engaged in the lumber business, to-wit, the defendant and J. C. Morton as one firm, Burton-Lingo Co. as one firm, Conway & Leeper as one firm, and A. C. Ford as one firm, and

that no other firms were engaged in buying and selling lumber for profit in the city of Cleburne at the time defendant entered into said contract with plaintiffs; and that for the purpose and with the intent to control the sale of lumber and to create and carry out restrictions in the sale of lumber in the city of Cleburne, and also to create and carry out restrictions in the free and full pursuit of the lumber business in the city of Cleburne, in buying and selling lumber in said city, and also to increase the price of lumber in the city of Cleburne, and to prevent the competition in the sale of lumber in the city of Cleburne, and to fix a certain standard whereby the price of lumber intended for sale, use, or consumption in said city of Cleburne, in Johnson county, Texas, should be controlled and established, and also for the purpose of keeping the price of lumber at a fixed and graded figure in the city of Cleburne, and also for the purpose of creating a monopoly in purchasing and selling lumber by themselves and by their said firms and companies in the city of Cleburne, plaintiffs combined, confederated, agreed, and contracted among, with, and between themselves to purchase the lumber then owned by defendant and J. C. Morton in the city of Cleburne, and did then and there, under said agreement and contract among, with, and between themselves, for the purpose aforesaid, purchase the lumber then owned by defendant and J. C. Morton in the city of Cleburne, mentioned in said written contract, and did then enter into said written contract with defendant and J. C. Morton; and as part of the consideration plaintiffs paid the defendant and J. C. Morton for said lumber plaintiffs obligated and bound defendant and J. C. Morton as a firm and as individuals to go out of the lumber business, and not to go back into said business, or lumber business, or engage to work for any one in said business, or lumber business, and not to sell lumber within the limits of the city of Cleburne, for a period of ten years from the date of said contract, except defendant and said Morton were granted the right to work in the lumber trade in the city of Cleburne during the said ten years for either of said firms, provided either of said firms should consent to give defendant and said Morton such employment, and except defendant and said Morton were granted the right to purchase an interest in the business of either of said firms in

the city of Cleburne, or to purchase the entire interest of either of said firms in the lumber business in the city of Cleburne. Wherefore defendant says that said contract is illegal and void, and ought not to be enforced against defendant."

The appellees interposed a general demurrer to said paragraph of appellant's answer, which demurrer was sustained by the court, and the appellant excepted. There was a trial, which resulted in a decree granting the injunction prayed for, and in a judgment for \$56 damages.

The appellant has appealed from said judgment and decree, and has assigned as error the action of the court below in sustaining the general demurrer to the paragraph of his answer quoted above. No other question is presented. It is insisted that the contract sued on is null and void, both at common law and under the statute.

1. It is universally held by the courts of the United States, in passing on such contracts, that, if the restraint is unlimited both as to time and place, the contract is void: and it appears to be generally conceded that, if the restraint is unlimited as to place only, the contract is illegal. On the other hand, if the restraint is limited as to place, though not as to time, or if limited both as to time and place, the validity of the contract depends on the reasonableness of the restriction. In determining whether the restraint is reasonable in any particular case, all the circumstances surrounding the transaction must be taken into consideration. On such inquiry the nature of the business, the sum invested, the demands of trade in the territory to be affected, and all other matters of like character are material. Where the circumstances appear in the face of the contract, the courts will determine the question of the reasonableness of the restriction as a matter of law. When they do not so appear, the contract will not be held invalid, but, when sued on, the party seeking to avoid liability under it should plead and prove the facts which would make it unlawful. Its illegality will not be presumed, but must be shown by the proper pleadings, and established by sufficient evidence. The restriction may relate as well to the acceptance of employment as to the carrying on of a business.

In this case the restraint is limited both as to time and place, and the circumstances surrounding the transaction are

not stated in the contract. An inspection of the contract does not disclose any facts which would make it void. The plea of the appellant simply charges that the appellees, being the only other dealers in lumber at Cleburne, combined to buy, and did buy, the stock and good will of Comer & Morton, for the purpose of preventing competition and controlling prices. These facts, if true, do not show any injury or wrong done to or suffered by the appellant, and, there being no allegation of an agreement between the appellees not to compete with each other, or of an agreement to sell only at certain prices, the public was not affected. The contract was valid and binding at common law.

2. The anti-trust law does not apply to the sale of a business and the good will thereof, accompanied by an obligation on the part of the seller not to resume business for a limited time at a specified place, where the purchaser is a single person or firm. *Gates v. Hooper* (Tex. Sup.) 39 S. W. 1079; *Erwin v. Hayden* (Tex. Civ. App.) 43 S. W. 611. Does it apply to a combination of two or more dealers to buy the stock and good will of an opposition dealer for one of the purposes prohibited by the statute? The combination prohibited by the law in force when the contract before us was entered into was the union or association of the capital, skill, or acts of two or more persons, firms, or corporations for the purpose of doing either of the things denounced by the statute. If the combination is consummated, and its purpose is unlawful, then it is immaterial as to whether it is reasonable from a business standpoint, or as to how it will affect the public. The object of the statute was to prohibit any combination having for its purpose the doing of either of the things specified, without regard to the intention of the parties, or of the immediate effect of the combination on trade and commerce, as the power arising from such combination was believed to be dangerous to public interests. Therefore the legislature did not attempt to regulate such combinations, but prohibited them entirely.

It is charged against the appellees that they entered into a combination to buy, and did buy, the stock in trade and good will of Comer & Morton. Such combination required the union of the acts and of part of the capital of the appellees, and if the purpose of the combination was to create or carry

out restrictions in trade or in the free pursuit of business, or to prevent competition, it was unlawful. It is alleged that such was its purpose, and, while the allegations contained in appellant's plea are general in their nature, we think that the plea is good on general demurrer.

The statute declares that all contracts and agreements in violation of the anti-trust law are absolutely void, and not enforceable, either in law or equity. By this suit the appellees seek to secure the benefits of their alleged illegal combination, and the courts are not permitted to lend their aid towards the accomplishment of such purpose.

*The judgment is reversed, and the cause remanded.*¹⁰

SECTION 3

EXCLUSIVE CONTRACTS OF SALE AND PURCHASE

CONTINENTAL WALL PAPER CO. v. VOIGHT & SONS CO.

(Supreme Court of United States, 1909. 212 U. S. 227.)

Statement by Mr. Justice HARLAN:

The Continental Wall Paper Company, a corporation of New York, brought this action against the Lewis Voight & Sons Company, a corporation of Ohio, to recover the sum of \$56,762.10, as the alleged balance on an account for merchandise sold and delivered to the defendant.

10—Carter-Crume Co. v. Peurrung, 86 Fed. 439, 442, Lurton, C. J., said: "If one contracts with a manufacturer for his entire product, it will, of course, restrain the producer from selling to others. But such a contract, taken by itself, is ordinarily harmless. The public are not affected. Another question might arise if all or a large proportion of all the producers of a particular article should agree to sell their entire product to one buyer, who would thereby be enabled to

monopolize the market. But, if each independent producer contract to sell his product, or to sell or lease his plant, without concert with others, or knowledge of or purpose to participate in the plans of the buyer, he cannot be said to have conspired against freedom of commerce, or to have made a contract in illegal restraint of trade. The transaction with Peurrung Bros. & Co. was, on its face, legitimate, and it cannot be impeached simply by evidence that the Carter-Crume Com-

The petition and answer were both amended. The amended answer contained six separate defenses, the last three of which were made counterclaims and cross petitions. The plaintiff demurred to the second, third, fourth, and fifth defenses upon the ground that neither of them stated facts sufficient to constitute a defense; and it demurred to the first and second counterclaims and cross petitions upon the ground that they did not state facts sufficient to constitute a cause of action against the plaintiff. It also replied to the sixth defense and to the third counterclaim.

The cause was submitted in the circuit court on the demurrers, and the court sustained the demurrer to the second,

pany understood and intended it as one step in a general illegal scheme for monopolizing the trade in wooden butter dishes, and controlling prices. The principle, if we admit that the purpose of the Carter-Crume Company was illegitimate, is that which is applied to so-called wagering contracts. The proof must show that the illegal purpose was mutual. *Roundtree v. Smith*, 108 U. S. 269; *Irwin v. Williar*, 110 U. S. 499; *Bibb v. Allen*, 149 U. S. 481."

Steele v. United Fruit Co., 190 Fed. 631, *Foster, D. J.*, said, p. 636; "It has been urged with great earnestness and vigor by counsel for complainants that the contract by which the United Fruit Company acquired its stock was illegal, and it acquired nothing; that the stock standing in its name is void and it can transfer nothing, and that in any event, not having the right to vote the stock, it could not transfer the right to a purchaser. It may be that such a solution of the trust problem is desirable, but I cannot see my way clear to adopt complainants' contentions in the absence of a positive statute, especially in view of the expressions of the Supreme Court in the cases of *Harriman v.*

Northern Securities Company, 197 U. S. 298, 49 L. Ed. 739, *The Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. Ed. 619, and the *United States v. American Tobacco Company*, 221 U. S. 106, 55 L. Ed. 663, recently decided. The authorities cited by complainants would perhaps be persuasive if their first premise was correct, but the Supreme Court has clearly drawn the distinction, thin though it may be, between unlawful contracts and those incidental and collateral to them. The contract of sale by which the United Fruit Company acquired this stock was not of itself illegal and it undoubtedly acquired the ownership subject to the restrictions the law has placed upon its use. *Continental Wall Paper Company v. Voigt*, 212 U. S. 258, 53 L. Ed. 486; *Conolly v. Union Sewer Pipe Company*, 184 U. S. 540, 46 L. Ed. 679.

"I therefore must hold that the United Fruit Company has the right to dispose of its stock, and the purchaser will be entitled to vote it, provided the transfer is entirely without suspicion of retained control, and he is not otherwise prohibited by law to do so."

fourth, and fifth defenses and to the first and second counterclaims and cross petitions, but overruled the demurrer to the third defense. The parties not desiring to plead further, it was adjudged that, upon the allegations of the third defense, the defendant was entitled to judgment (and judgment was entered) dismissing the petition and amended petition; and was likewise entitled to judgment (and judgment was entered) dismissing the first and second counterclaims and cross petitions. The case was carried by the Continental Wall Paper Company to the circuit court of appeals, where it was assigned for error that the circuit court erred in overruling the demurrer to the third defense, and in dismissing the suit. The circuit court of appeals affirmed the judgment, thereby sustaining the sufficiency of that defense. The case is fully reported in 78 C. C. A. 567.

If the facts stated in the third defense—taking them to be true, as upon demurrer we must do—are sufficient to prevent any recovery whatever, by the plaintiff, it is not necessary to go further and consider any other questions. In view of the peculiar character of the case it is deemed just to the parties, however much it may lengthen or burden this opinion to do so, to set out that defense fully and in the words of the answer.

The third defense—the facts stated therein being admitted by the demurrer—gives the names of numerous companies and firms (more than thirty in number) which formed a combination by the name of the Continental Wall Paper Company, and also sets out the various agreements under which, it was alleged, the combination was organized to restrain and monopolize interstate commerce. The defendant corporation alleged that on the 1st day of July, 1898, the National Wall Paper Company was the owner of factories for the manufacture of wall paper in certain cities in New York, Pennsylvania, New Jersey, and Massachusetts, and that there were like factories owned by persons and corporations in other states; that “all of said companies and firms were engaged in the manufacture of wall paper and in selling their product in the states where their said manufactories were situated, and in all the other states and territories of the United States and in foreign countries, and were each and all engaged in commerce between

the states and territories and with foreign nations, and they produced and sold upwards of ninety-eight (98) per cent of all the wall paper manufactured and sold in the several states and territories of the United States. Contriving and intending and conspiring with each other to form a combination and trust by which to limit the production of wall paper in the United States, and also to enhance the price thereof to the jobbers, the wholesalers, the retailers, and the consumers of wall paper, which is an article of commodity of general necessity and use among the United States and foreign countries, and, as such, was and is used and sold everywhere for the preservation, protection, and decoration of buildings and dwelling houses; and, contriving and intending and conspiring with each other to unlawfully control and restrain trade and commerce between the several states and territories of the United States, and with foreign countries, the firms and corporations hereinbefore mentioned agreed with each other that while said corporations and persons retain the ownership of their several plants and business, and preserve and continue their separate identities, and operate said several manufactories and business as before, the control of said several businesses, and all matters relating to and affecting the production of said establishments, and the prices and sale of wall paper manufactured thereby, should be placed under the control of a committee to be appointed by said several corporations and firms, each to have a voice in such appointment, in proportion to the capacity of the several factories owned by them respectively; that said committee should adopt rules and regulations governing the manner of conducting the business of all said persons, firms, and corporations, the hours said factories, owned by them, should be operated, the patterns of wall paper to be manufactured by them, the times when samples of the goods to be manufactured for the ensuing season should be submitted to a pricing committee, appointed by said committee, to enable it to classify and fix the list prices thereof; to fix and determine list prices, discounts, terms of sale, equalization of freight rates, and all other matters affecting the production and regulation of prices, and the classification of the dealers in wall paper in the United States; and the prices at which wall paper should be sold to and by such several classes; and

the division of the profits thence arising among said corporations and firms, not in proportion to their production and sales, but in proportion to their capacity; and, further, that, to secure the faithful performance by each of said persons and corporations of the provisions of said trust agreement, they should each pay a sum into a common pool, in proportion to the capacity of their respective manufactories, which said sum should be forfeited by any of said manufacturers who should break said agreement, compete with the other parties to said agreement, or sell at other or different prices than those to be fixed by said committee."

'The National Wall Paper Company, for itself and the members of said combination, hereinbefore alleged to be represented by it, should select three (3) so-called directors of said the Continental Wall Paper Company, and said other firms and corporations should select three (3) other so-called directors of said company, which six (6) so-called directors should select a seventh (7th), who should decide all disputed matters; that said corporation and firms, calling itself, or themselves, respectively, the vendor, should sign a printed contract or agreement with said the Continental Wall Paper Company, calling itself the company, a copy of which contract or agreement is attached hereto marked 'Exhibit 1' [which is given in the margin¹¹], the said agreement being printed with blanks for the necessary signatures as well as numbers of

11—Exhibit 1. An agreement, made this — day of — in the year one thousand eight hundred and ninety-eight, by and between — a corporation organized under the laws of the state of — (hereinafter called the vendor), party of the first part, and the Continental Wall Paper Company, organized under the laws of the state of New York (hereinafter called the company), party of the second part.

Whereas, the vendor is engaged in the manufacture and sale of wall paper, borders, and other articles usually produced and handled in

connection therewith, and the company is desirous of acting as its selling agent in handling the entire product of the vendor; and

Whereas, the company has an authorized capital of \$200,000, divided into 16,000 shares, of the par value of \$12.50 each; and

Whereas, the vendor is desirous of acquiring shares of the stock of said company at par, and to that end has offered to enter into this agreement and to secure the performance thereof by the deposit of said shares.

Now, therefore, in consideration of the foregoing recitals, and for

shares allotted, the sum to be paid therefor, and the name of the so-called vendor.

"For the purposes and with the intentions aforesaid, it was further agreed that said the Continental Wall Paper Company should, in some form so as to disguise the real nature of the transaction, compel all dealers in wall paper, whether jobbers or wholesalers, to sign an agreement obligating the jobbers or wholesalers to buy from no one but said members of said combination and trust, and at the prices fixed in schedule B, attached to said 'Exhibit 1,' and likewise an agreement by such jobbers not to sell goods to dealers other than jobbers, at lower prices or upon better or more favorable terms than those shown in schedule C, attached to said 'Exhibit 1,' under the penalty that, if they refused so to do, no wall paper should be sold to such jobber by any of said corporations or firms, and that, thereby, such jobbers should be driven out of business; and that, in some form or other, so as to disguise the real nature of the transaction, all wholesalers other than jobbers should be compelled to make an agreement in writing,

other good and valuable considerations, it is agreed between the parties hereto, as follows:

First. The vendor hereby agrees to sell unto the company, and the latter agrees to purchase, the entire product of wall paper that may be manufactured by the vendor for the period from July 20th, 1898, to the 1st day of July, 1899.

The prices at which the merchandise shall be sold to the company are set forth in a schedule hereto annexed, marked "A," and hereby made part of this agreement.

The vendor further grants unto the company the right to two renewals of said contract of one year each, provided that, in the event of the election of the company to avail itself of either of said renewals, it shall so signify in writing to the vendor before the first day of June next preceding the renewal term, and

provided further that such election to renew shall be accompanied by the written consents of all the registered stockholders of the company, including that of the vendor.

Second. That the goods acquired by the company from the vendor hereunder which are to be sold to jobbers, shall be so sold by the company, and not by the vendor, for the account of the company. Such sale shall be made by the company at discounts from road prices fixed in the schedule hereto annexed, marked "B," which is hereby made part of this agreement. The vendor will deliver such goods upon the direction of the company, at the risk and for the account of the latter, f. o. b. at the place of manufacture, provided, however, that, in all cases in which the goods are manufactured at places other than the cities of New York or Philadelphia, the vendor

with said corporations or firms, not to sell such goods, on terms better or more favorable than those specified in schedule C, attached to said 'Exhibit 1,' under penalty that, if such wholesaler refuse to sign and carry out said agreement, no wall paper would be sold to him by any of said corporations or firms, and he should be driven out of business; and that the profits made by such prevention of competition and enhancement of price should be divided among said corporations and firms nominally as dividends upon said stock, but in reality, in proportion to their respective holdings, as aforesaid, and that said committee of said corporation and said firms, calling themselves such directors, should regulate all the matters hereinbefore averred, prevent competition between said corporations and firms, limit production and enhance prices, and close all channels by which the consumer or retailer could obtain wall paper from the producers thereof.

"In pursuance of said agreement, said plaintiff was nominally incorporated with the stock aforesaid, divided into the number of shares aforesaid, of the par value aforesaid, which

will equalize the freights with either of said cities out of the proceeds receivable for such goods. Memorandum invoices shall be supplied to the customers and to the company immediately upon the shipment and delivery of such goods, said invoices specifying quantities and road prices.

Third. There shall be furnished by the vendor to the company, on the 7th, 14th, 21st, and last days of each month (except when those days fall on Sundays, and then on the next preceding day), a just and true statement of all shipments and deliveries of merchandise included in this contract which the vendor may make for the account of the company, which statement shall contain the names of the purchasers, the character of the goods sold, and the prices at which they are sold, to the end that the company may make the

proper charges, and in order to entitle the vendor to be credited with the agreed cost price for such goods.

Each of such statements of shipment shall be accompanied by an affidavit of one of the officers of the vendor and one of its bookkeepers and of one of its shipping clerks, to the effect that the information contained therein is true.

Fourth. The vendor will, at the option of the company, sell for the latter such of the goods manufactured by the vendor as are to be disposed of to purchasers not classified as jobbers, which sales shall be made at the cost and expense of the vendor, said vendor hereby guaranteeing all credits connected with such sales. The prices at which and the terms upon which such goods are to be sold are designated in this agreement as the "road prices," and are contained in a schedule hereto annexed,

were divided among the parties to said agreement aforesaid, in the manner aforesaid, and said contracts signed by said the National Wall Paper Company and said persons and corporations being, at once, subscription for stock by said so-called vendors, the acceptance of such subscription by said the Continental Wall Paper Company, and by it, nominally, each so-called vendor sold unto the company, and the latter agreed to purchase, the entire product of wall paper manufactured by each of said vendors for the period from July 20th, A. D. 1898, to the 1st day of July, A. D. 1899.

"Said contract further fixed prices at which the merchandise should be nominally sold to the company, said prices being the cost of production with a slight profit added thereto, sufficient to cover incidental expenses merely. The prices at which said goods were to be nominally sold by said so-called vendors to said company are set forth in the schedule attached to said 'Exhibit 1' and marked 'A.'

"Said agreement further nominally provided that the goods pretended to be acquired by the company from the so-called

marked "C," which is hereby made a part of this agreement.

On the 7th, 14th 21st, and last days of each month (except when those days fall on Sundays, and then on the next succeeding days), the vendor will furnish to the company a statement showing all the shipment made on account of such sales, which statement shall contain the names of the purchasers, the character of the goods, and the prices at which they were sold, and such sales shall be credited to the vendor by the company at the prices fixed in schedule "A," and shall be charged against said vendor at the prices at which they were sold, which shall in no event be less than those designated in schedule "C."

The vendor is to receive for its services and expenses connected with such sales and allowances discounts equal to those who are designated in

a classification made by the parties hereto as "second-class jobbers," less the discounts made on sales to purchasers designated in the accompanying schedules as "quantity purchasers" on which the vendor has allowed the quantity discount, except that where special and exclusive goods are sold there shall be an allowance of 30 per cent discount to the vendor.

The prices of goods as fixed by schedule "A" and "C" may be altered from time to time, but the discounts allowed to jobbers shall not be altered at any time during the term of this agreement.

Fifth. The vendor will make collections of all accounts for goods sold by it for the accounts of the company under the provisions of the agreement, except for sales to jobbers (which accounts the company is to collect), and will, on the 10th

vendor, which were to be sold by jobbers, should be so sold by the company, and not by the vendor, for the account of the company, but that the goods acquired by the company from the so-called vendor, which should be sold to wholesalers other than jobbers, should be sold by the so-called vendor for the account of the company.

"The schedule attached to said agreement contained a list of prices for all commodities in the wall paper line, which were called 'list' or 'road price,' and said contract provided that sales made to jobbers should be made at discounts from said 'list' or 'road prices' fixed in the schedule marked 'B,' annexed to said 'Exhibit 1,' but that, in all cases in which the goods were manufactured at places other than the cities of New York or Philadelphia, and sold to jobbers, the vendor should equalize the freights with either of the said cities, out of the proceeds receivable for such goods.

"In reality, the agreement was, and so the business was carried on, that the manufacturers should maintain sample rooms and selling agents, and should solicit and receive the

of each and every month during the term of this agreement, account to the company. Such accounts shall be accompanied by a payment by the vendor to the company of the difference between the prices at which the goods are agreed to be sold to the company, as embodied in schedule "A," and the prices at which the vendor has agreed to dispose of said goods as contained in schedule "C."

The purchases made by the company from the vendor hereunder shall be upon the same credit and terms as those accorded to other dealers, but the company shall have the right to anticipate the due date of all such purchases, and will pay, on the 10th day of each month, to the vendor, a sum on account of all shipments of the preceding month equal to not less than 30 per cent of the road prices of goods shipped to the jobbers by the company.

Sixth. The vendor hereby grants unto the company the right, and it shall be the duty of the latter, through its officers selected for that purpose, to audit the books of accounts of the vendor at such times and in such manner as the company may, from time to time, deem necessary or proper. This provision is of the essence of the agreement, and a failure on the part of the vendor to faithfully perform the same shall operate as a breach of the contract, entitling the company to abrogate the agreement, and to such damages as it may be able to establish in addition to the absolute transfer and surrender to it of the stock to be pledged as hereinafter provided.

Seventh. There shall be a committee selected from the company, to be known as an auditing committee, which shall be made up from among the directors. Said committee

orders from all wholesalers, whether jobbers or so-called 'road' or 'quantity buyers;' that the entire business should be done by said so-called vendors, but payments should be made by the jobbers to the so-called company, and by the wholesalers, other than jobbers, directly to the so-called vendors.

"Said contract further provided, in order to protect said corporations and firms against competition from each other, and to insure against violation of said agreement, or any of them, that, from time to time, invoices should be supplied, at once to the customer and to the company, upon shipment and delivery of such goods, specifying quantities and road prices; that each vendor should furnish to the company, at periods stated, just, true, and sworn statements of all shipments and deliveries of merchandise made by the vendors direct to the purchasers, which statements should contain the names of the purchasers, the character of the goods sold, and the prices at which they were sold, so that the company might receive the difference between the prices at which the goods were nom-

shall have power to establish such a system of bookkeeping as, in its judgment, may be advisable.

In order to conform as nearly as may be to the laws of the various states in which the factories of the vendor are located, it is understood that the vendor shall not be at liberty to require from the company the acceptance of the product of more than ten hours per day of any one of said factories.

The product intended to be sold to the company hereunder and which the latter undertakes to acquire, does not contemplate the enlargement of the manufacturing facilities of the vendor, but nothing herein contained shall be construed as affecting the right of the vendor to substitute new machinery of the same capacity for any now in use which may become useless through wear or through destruction by fire or other casualty.

The power to designate the parties who are to be classed as jobbers, and the discounts to which they are entitled, is expressly reserved by the company, and such designation is to be made through its board of directors; but the vendor shall have the right to select the jobbers through whom the goods manufactured by it are to be distributed.

All orders placed with the vendor by jobbers on behalf of the company must at once be reported to the latter.

Eight. The company hereby agrees to sell, and the vendor agrees to purchase, ——— shares of the common stock of the company, for which stock the vendor agrees to pay the sum of ——— in cash as soon after the execution and delivery of this agreement as the same may be demanded by the company, but only if and when the entire share capital of the company shall have

inally billed to said company, and at which they were sold to the purchaser, to the end that this difference, being the net profits derived from such purchase and sale, should be divided among such corporations and firms, in proportion to the capacity of their respective businesses, determined as aforesaid, without regard to the amount sold by each.

"The prices at which, and the terms upon which, goods were to be sold by the vendors to all wholesalers other than jobbers, were designated 'road' or 'list' prices, and were contained in the schedule marked 'C,' annexed to said 'Exhibit 1,' and forming a part thereof.

"For the further purpose of carrying out said agreement, and ascertaining said net profits, and for further disguising the real nature of the transaction, it was provided that the so-called vendor should receive from sales made by it to so-called 'quantity buyers,' the difference between the discounts allowed to those designated in the classification hereinbefore referred to as 'second-class jobbers' and the discounts provided in said agreement to be made to purchasers styled, in said

been fully subscribed at not less than par.

The vendor will, after paying for said shares of stock, indorse the certificates representing the same, and deliver the certificates so indorsed in blank unto the company, upon the trust and agreement that the company shall hold said certificates as security for the performance by the vendor of each and all of the covenants and conditions of this agreement and that, upon the refusal, neglect, or omission of the vendor, its successors or assigns, to perform this agreement, or any part thereof, the said shares of stock and certificates represented thereby shall be immediately sold by the company at public or private sale, without notice, upon such terms and at such price as the company or its officers may deem reasonable, and that the proceeds of the sale be paid into the

treasury of the company as agreed and liquidated damages to the company for the breach of said agreement.

The parties hereto have fixed upon the said stock, and the proceeds thereof, as liquidated damages, because of the difficulty in establishing, in a court of law, the actual damage that would be suffered by the company in the event of the refusal, neglect, or omission to perform this agreement, and in order to avoid the difficulty of such proof.

In witness whereof, the vendor and the company have respectively caused this agreement to be executed by their respective presidents and their respective corporate seals to be hereto attached pursuant to resolutions of their respective boards of directors, the day and year first above written.

schedules, 'quantity buyers' in which the vendor is allowed the quantity discount, except that, where special and exclusive goods were sold, there should be an allowance of thirty (30 per cent) per cent discount to said vendor.

"Said agreement further stipulated that the prices of goods as fixed by said schedules A and C might be altered from time to time, but the discounts allowed to jobbers should not be altered at any time during the term of the agreement.

"Said written contract further provided that the so-called vendor should make collections of accounts for goods sold to wholesalers other than the jobbers, but that the company should collect the proceeds of sales to the jobbers, and that accounts should be stated between the so-called vendors and the company at stated periods, and the account accompanied by payment, by the so-called vendor, to the so-called company, of the difference between the prices at which the goods were to be billed to the company and the prices at which the so-called vendors had agreed to charge the 'quantity buyers.'

"It was further stipulated in said agreement that monthly divisions should be made by said company of at least thirty (30) per cent of the 'road prices' of goods shipped to jobbers by the company.

"For the further purpose of protecting said corporations and firms and individuals from each other, preventing and stifling competition, and enforcing said combination, trust, and monopoly, each of said corporations and vendors gave the company the right, and made it the duty of the company, to audit the books of account of said so-called vendors, at such times and in such manner as the company might, from time to time, deem necessary or proper. It was further stipulated that this right to examine and audit the books was of the essence of the agreement, and that a failure on the part of the so-called vendor to permit the same should operate as a breach of the contract, entitling the company to abrogate the agreement, to recover such damages as it might be able to establish, and to the forfeiture of the stock held by said vendor in such company.

"It was further provided that said so-called company should appoint an auditing committee from its directors, which should

establish such a system of bookkeeping as it thought advisable.

“It was further a part of said agreements, though not reduced to writing, save as it set forth in said exhibit that all jobbers and other wholesalers of wall paper should be forced to sign an agreement, binding themselves to purchase their entire stock of wall paper, nominally either from plaintiff or from said corporations or firms, at prices fixed in said ‘Exhibit 1,’ and that they should only sell at prices fixed in the schedules attached to said ‘Exhibit 1,’ under the penalty, which the combination of all of said corporations and firms enabled them to enforce, that such jobbers or wholesalers, in case of refusal to accede to the terms so imposed, or in case of violation thereof, should be unable to buy wall paper; should be driven out of business, and should sacrifice the good will and capital therein invested.

“In the further carrying out of said purpose, said plaintiff and other persons, natural or artificial, engaged in the manufacture and sale of wall paper in different states of the Union, and in trade and commerce between the several states and foreign countries, whose names and locations these defendants are unable to state, entered into contracts substantially similar to ‘Exhibit 1,’ except that, instead of such persons pledging stock in plaintiff as security for the performance, by them, of the stipulations of said contract, they gave other security, the nature of which these defendants are unable to state, and which such other persons assume obligations, and gave to said plaintiff rights and powers, and said plaintiff exercised, as to them, such rights and powers, as were created by said instrument ‘Exhibit 1,’ and were exercised by plaintiff and its officers and directors in relation to the persons, natural or artificial, who were theretofore members of such combination and trust.

“In the further carrying out of said scheme to stifle competition; to restrain commerce between the states and territories of the United States and with foreign countries; to unduly and unreasonably enhance prices,—it was further agreed between the members of said combination and trust that the so-called directors of plaintiff, being really a com-

mittee appointed, as aforesaid, by said the members of said trust or combination, should arbitrarily classify the wholesale dealers of wall paper in the United States and territories thereof, into two (2) classes; namely, jobbers and 'road' or 'quantity buyers;' that they should further arbitrarily classify the jobbers into 'first class,' and 'second class' and 'third class' jobbers; that they should further arbitrarily classify the other wholesalers into 'road' or 'quantity buyers,' and 'special buyers;' that, being thus classified, they should all be compelled to sign written agreements, nominally with said company, really with said members of said combination or trust, obligating them to buy their entire stock of merchandise from said company.

"A copy of said agreement, so to be signed by said jobbers, is attached hereto, marked 'Exhibit 2' [which is in margin ¹²]

12—Exhibit 2. An agreement made this — day of —, in the year one thousand eight hundred and ninety-eight, between the Continental Wall Paper Company, a corporation organized under the laws of the state of New York (hereinafter called the company), party of the first part, and —, of — (hereinafter called the jobber), party of the second part.

In consideration of the sum of one dollar, paid by the jobber unto the company for granting of this agreement, the receipt whereof is hereby acknowledged, and other valuable considerations, it is agreed between the parties hereto as follows:

First. That the company will sell, subject to such credit limitation as it may impose, and the jobber will purchase, the entire requirements of the jobber in his business of selling wall paper for the business year ending July 1st 1899, to the amount of a gross value, without discounts, of —, the jobber reserving to himself the right to purchase such mer-

chandise as he may need in excess of — from others.

The company is to deliver the goods without additional charge f. o. b. at New York or Philadelphia, or to equalize freights from the places at which it makes deliveries to either of said cities.

Second. The jobber shall be allowed discounts at the rates shown in the accompanying schedule, marked "A," which is hereby embodied in this agreement as a part thereof.

The terms of payment to be as follows: Four months from the date of invoice, with discount at the rate of 1 per cent per month for anticipated payment; provided settlement be made within 30 days from date of shipment, either by cash or note. Invoices for all goods shipped between October 15th and March 1st to take the latter date.

Third. Attached hereto, marked "B," is a schedule of the road prices at which the company sells its goods for the term embraced in this contract to dealers other than jobbers, and also a statement of dis-

and made part thereof, the same being printed forms with blanks for names, dates, and amounts of purchases.

“To conceal the fact that it was an agreement to purchase from no one but said company, and the members of said combination and trust, the amount of purchases made by the buyer in the previous year, from all the members of said combination or trust, being the entire amount of purchases made by such buyer during the preceding year, was ascertained, and an amount at least double thereof, being an amount supposed to be, and which was in fact, more than, by any possibility, could be needed by such buyer, was inserted in said blank as the amount to be purchased by such buyer from the company.

“By said agreement, the prices to be paid by the jobber were fixed according to the class in which he was arbitrarily placed, at prices enumerated in schedules B, attached to said ‘Exhibit 1,’ and the prices at which, alone, said jobber could sell, were fixed as shown by schedule C, attached to said ‘Exhibit 1.’

“Schedule A, attached to said ‘Exhibit 2,’ is the same, so far as relates to jobbers of the class with whom the agreement is made, as the corresponding provisions of schedule B, attached to said ‘Exhibit 1’ and schedule B, attached to ‘Exhibit 2’ is the same as schedule C, attached to ‘Exhibit 1.’ The members of said combination and trust, and said plaintiff, further to carry out said agreement, compelled all other wholesale and quantity buyers to sign agreements in the form at-

counts allowed to such customers other than jobbers for quantity purchases, together with the terms of credit and freight allowance to which such customers are entitled.

It is an essential condition of this agreement that the jobber will not, directly or indirectly, sell or offer for sale any of the merchandise purchased from the company hereunder at lower prices or upon better or more favorable terms than those shown in schedule “B,” the intent hereof being to assure the company

against the use by the jobbers of this agreement to undersell the company.

The prompt performance by the jobber of the provisions of this agreement as to payment and otherwise is a condition precedent to exacting the continuous performance of said agreement by the company.

In witness whereof the company has caused this instrument to be executed, and the jobber has herunto set his hand, the day and year first above written.

tached to this answer, marked 'Exhibit 3' [which is in the margin ¹³], and filed herewith; the same being a printed form with blanks for signatures, and having attached thereto the prices shown in schedule C, attached to 'Exhibit 1,' which are the list prices referred to in said agreement.

"All said agreements, 'Exhibits 1, 2, and 3' were drawn for the purpose, and with the intent, of disguising the real nature of the transaction and the real purpose, as herein set forth.

"In further carrying out said combination, and with said purpose and intent, agreements were made by plaintiff and the members of said combination and trust, and persons, natural and artificial, in the Dominion of Canada, by which each agreed not to compete with the other, nor cut prices, the Americans in Canada, the Canadians in the United States.

"On, before, and after said 1st day of July, A. D. 1898, this defendant had a large and profitable business of long standing, possessing a valuable good will, and in which they had a large capital invested, being what is generally called the business of a jobber or wholesaler of wall paper in the state of Ohio and throughout the states and territories of the United States.

"The defendant and all other persons engaged in the wholesale wall paper business, at the beginning of each season,

13—Exhibit 3. In consideration of your having sold us wall paper, etc., at list prices and at quantity discounts as per following schedule:

	Per ct.	Per ct.
Up to 5½c.		
inc...600 rolls, 5	1200 rolls, 10	
6c. to 9c.		
inc...300 rolls, 7½	600 rolls, 12½	
10c. to 15c.		
inc...200 rolls, 10	400 rolls, 15	
16c. and		
up...100 rolls, 10	200 rolls, 15	
Discount on borders and ceiling papers follow the discounts on the hangings they match.		

Plain ingrains:

Varnish tiles, 200 rolls or more, 10 per cent.

Ingrain borders, 26 rolls of a kind, 10 per cent.

Ingrain borders, 50 rolls or over, 15 per cent.

We hereby agree not to sell any of such goods to others on terms better or more favorable than those specified in the above schedule nor lower than said list prices, and our faithful performance of this agreement is a condition precedent to the filing of our order.

The intent hereof is to protect you fully against being undersold by us among customers to whom you do allow quantity discounts.

which commenced in September and closed the first of July, following, according to the custom of the trade, bought from the various persons engaged in the manufacture and sale of wall paper in the *United States, being the persons, members of said combination and monopoly, their stock of wall paper to be sold by them during the ensuing year, such stock to be manufactured for them from samples submitted at the beginning of said season, in wholesale lots, and those for defendant to be shipped to Cincinnati, Ohio, and there resold by defendant, from time to time, to retail dealers throughout the states of Ohio, Kentucky, Indiana, Illinois, and other states and territories of the United States.*

“At said time said members of said combination and trust having, by the agreements and acts aforesaid, obtained the control of the wall paper trade throughout the United States, at once greatly advanced the price of said wall paper, and threatened defendant that, unless it signed said agreement, ‘Exhibit 2,’ no wall paper would be sold to it; that said combination would make it impossible for it to buy wall paper, or to continue its business, and would drive it out of its said business, and compel it to sacrifice the good will owned by it as aforesaid, and the capital invested by it in said business.

“Said combination or trust then, and from that time thereafter, until the first day of July, A. D. 1900, had the power, by means of said combination and said agreements, and the will, to carry out its said threats, and deprive these defendants or any person, firm, or corporation engaged in the business of selling wall paper in the United States, of the power to obtain wall paper for its or their trade, and the will and the power to drive out of business any person, firm, or corporation engaged in the business of selling wall paper; deprive them of their good will, and compel them to sacrifice the capital invested in the business.

“In like manner, by the same means, all other jobbers and wholesalers of wall paper in the United States, and all persons engaged in commerce in the wall paper trade between the several states of the Union and foreign countries, were compelled to, and did, sign the agreements attached to this answer, as ‘Exhibits 2 and 3.’

“The immediate, intended, and direct effect of the said com-

bination and agreements was the stifling of competition between said manufacturers and vendors of wall paper, and between the jobbers and wholesalers thereof, and to unduly enhance the price of wall paper, making it one half more than the price which it would be had the same been left to free and unrestrained competition; to compel said jobbers and wholesalers to pay such unduly enhanced and unreasonable price to plaintiff and to members of said combination, and to exact from others an unduly enhanced price.

"After the making of said agreements, as before, the members of such combination solicited and received orders from this defendant, and all other wholesalers; filled their orders; charged the prices fixed in said schedules attached to said 'Exhibit 1,' and directed that payment for such merchandise should be made by the jobbers to said plaintiff combination for said several members of said combination and trust, to be divided in the manner aforesaid. Said combination contrived, intended, and did prevent free and unrestrained competition between the producers and between the purchasers of wall paper, and between the jobbers and wholesalers of wall paper throughout the United States.

"Defendant avers that said plaintiff and the members of said combination as aforesaid, being more than two persons, firms, corporations, partnerships, and associations, combined capital and skill for each and all of the following purposes, to wit: To create restrictions in trade and commerce; to carry out restrictions in trade and commerce; to limit the product of wall paper; to reduce the production of wall paper; to increase the price of wall paper; to prevent competition in the manufacturing and making of wall paper; to prevent competition in the sale of wall paper; to prevent competition in the purchase of wall paper; to fix a standard or figure whereby its price to the public or consumer should be controlled and established as to an article or commodity of merchandise, to-wit: wall paper intended for sale, use, and consumption in the states of Ohio, Indiana, Kentucky, and Illinois; to make and enter into contracts, obligations, and agreements by which they bound themselves not to sell or dispose of wall paper below a common standard figure or fixed value; to carry out contracts, obligations, and agreements by which they bound

themselves not to sell or dispose of wall paper below a common standard figure or fixed value; to make and enter into contracts, obligations and agreements by which they agreed to keep the price of wall paper at a fixed or graduated figure; to carry out contracts, obligations, and agreements by which they agreed to keep the price of wall paper at a fixed or graduated figure; to make and enter into contracts, obligations, and agreements by which they established and settled the price of wall paper between themselves and between themselves and others, so as to both directly and indirectly preclude a free and unrestricted competition among themselves, and among themselves and purchasers, and among purchasers in the sale of wall paper; to carry out contracts, obligations, and agreements by which they established and settled the price of wall paper between themselves and themselves and others, so as to both directly and indirectly preclude a free and unrestricted competition both between themselves and between themselves and purchasers, and between purchasers in the sale of wall paper; to make and enter into contracts, obligations, and agreements by which they agreed to pool, combine, and both directly and indirectly unite the interests they had connected with the sale of wall paper so that its price might be affected; to carry out contracts, obligations, and agreements by which they agreed to pool, combine, and both directly and indirectly unite the interests that they had connected with the sale of wall paper so that its price might be affected.

“Said contracts and agreements were each and all combinations and conspiracies in restraint of trade and commerce among the several states and with foreign nations, and had the intent and effect of restraining trade and commerce between the several states and with foreign nations, and were an attempt, by combinations and conspiracy, between the members of said combination and trust, to monopolize the trade and commerce in wall paper among the several states and with foreign nations, and, by said contracts, and the acts done by members thereof, and by said plaintiff under and in pursuance thereof, said plaintiff and the said members of said combination or trust did monopolize and attempt to monopolize the

trade and commerce in wall paper among the several states and with foreign nations.

"In further carrying out of said scheme and combination the members thereof delivered to this defendant, in the year from September, A. D. 1898, to September, A. D. 1899, wall paper for which this defendant paid to said plaintiff, for and per direction of the members of said combination, the sum of one hundred and forty-four thousand, eight hundred and fifty-four dollars and fourteen cents (\$144,854.14).

"These defendants aver that the prices charged in said Exhibit attached to said amended petition [which are itemized accounts, showing each article and the price therefor alleged to have been sold and delivered to the defendant] *are the prices fixed and determined in pursuance of and by the combination or trust agreement, as above set forth, and are unreasonable, unjust, and excessive, and at least one half more than they would otherwise have been. In transacting all business aforesaid, at all said times, said business was transacted under and in pursuance of said combination or trust agreement, and for the purposes, and each of them, above specified, and not otherwise.*

"The allegations in said plaintiff's petition set forth as a suit on account are an attempt to enforce, carry out, and recover upon and by virtue of said unlawful combination, aforesaid, *the prices fixed by such combination, and the prices therein sought to be recovered for said merchandise are unreasonable, excessive, and above the fair market price of such merchandise by more than the amount so sought to be recovered.*

"Each and all of the provisions of said contract and agreement between said members of said combination and each other; between said so-called vendors and said plaintiff; between said members of said combination and said plaintiff and the so-called jobbers; between the members of said combination and trust and said plaintiff and the so-called 'road' or 'quantity buyers,'—are each and all contrary to the provisions of the statutes of the state of New York, where said plaintiff was organized; contrary to the provisions of the laws of the state of Ohio, where the merchandise was delivered; contrary to the laws of the several states where each of the members of

said combinations did business; contrary to the laws of the United States; and made criminal by the laws of each of said several states and by the laws of the United States; and each and all of said agreements aforesaid are contrary to public policy, and in violation of the rights of the defendant, and injurious to the interests of the consumer and of the public."

MR. JUSTICE HARLAN (after making the above statement) delivered the opinion of the court:

The anti-trust act of 1890 declares illegal every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, and also declares it to be a misdemeanor, punishable by fine or imprisonment, or both, for anyone to make any such contract or to engage in any such combination or conspiracy. § 1. It is also made a misdemeanor, punishable by fine or imprisonment, or both, for anyone to monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states or with foreign nations. § 2. Similar provisions were made in reference to contracts, combinations in the form of trust or otherwise, or conspiracies, in restraint of trade or commerce in any territory of the United States or of the District of Columbia, or between any such territory or another, or between any such territory or territories and any state or states or the District of Columbia or with foreign nations, or between the District of Columbia and any state or states or foreign nations. § 3. The act further provided that any person injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful may sue therefor in the circuit court of the United States in the district where the defendant resides or is found, without regard to the amount in controversy, and recover threefold the damages sustained by him. § 3. 26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200.

The defendant contends that, under the facts admitted by the demurrer, it must be taken that the Continental Wall Paper Company is the representative in this suit of a combination or trust formed for the purpose of restraining and

monopolizing trade and commerce among the several states in the manufacturing, buying, selling, and dealing in wall paper; that this combination has the direct effect to accomplish that purpose; that the defendant, engaged in buying and selling wall paper in Ohio and other states, was compelled to become a party to the illegal combination or go out of business; that the account in suit was made up, as to prices and terms of sale, not upon the basis of an independent, collateral contract for goods sold and delivered, but with direct reference to, in conformity with, and for the object of enforcing, the agreements that constituted, or out of which came, the illegal combination whose business is carried on under the name of the Continental Wall Paper Company; that a judgment against the defendant upon the account in suit will, in effect, legally and practically aid the combination to reap the fruits of agreements that were illegal under the acts of Congress, and the making of which was declared by that act a crime; consequently, that the petition, upon the facts admitted, was properly dismissed.

That the combination represented by the plaintiff company is within the prohibitions of the above act of Congress is clear from the facts admitted by the demurrer. We assume, therefore, without discussion—for discussion is unnecessary—that there is a combination, of which the Continental Wall Paper Company is the representative, and that, in violation of that act, such combination was formed with the intent, and will have the effect, directly to restrain as well as monopolize trade and commerce among the several states and with foreign nations as involved in the manufacture, sale, and transportation of wall paper among the several states and with foreign nations. This part of the case is forcibly presented by the circuit court of appeals, which, in its opinion, delivered by Judge LUTON, well said: “The conspiring mills were situated in many states. The consumers [of wall paper] embraced the whole citizenship of the United States. The jobbers and wholesalers, who were to be coerced into contracts to buy their entire demands from the Continental Wall Paper Company or be driven out of business, were in every state. Before the combination each of the combining companies was engaged in both state and interstate commerce. The freedom of each,

with respect to prices and terms, was restrained by the agreement, and interstate commerce directly affected thereby, as well as by the enhancement of prices which resulted. A more complete monopoly in an article of universal use has probably never been brought about. It may be that the wit of man may yet devise a more complete scheme to accomplish the stifling of competition. But none of the shifts resorted to for suppressing freedom of commerce and securing undue prices, shown by the reported cases, is half so complete in its details. None of the schemes with which this may be compared is more certain in results, more widespread in its operation, and more evil in its purposes. It must fall within the definition of a 'restraint of trade,' whether we confine ourselves to the common-law interpretation of that term, or apply that given to the term as used in the Federal act." 78 C. C. A. 567, 575.

But it is contended that however illegal the combination represented by the plaintiff may be, and whatever may be the effect of a judgment against the defendant, the plaintiff company is entitled to a judgment under the principles announced in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 545, 46 L. ed. 679, 684. Let us see what that case was and whether it may not be distinguished from the one now before us.

The Union Sewer Pipe Company, a corporation of Ohio, doing business in Illinois, brought suit against Connolly, a citizen of Illinois, upon promissory notes given in Illinois on account of the purchase by the defendant from that company, under contracts made in that state, of sewer pipe known as Akron pipe. It also brought suit against one Dee, a citizen of Illinois, upon an open account for the value of similar sewer pipe sold to him under a written contract, also made in that state. In each case the defendant disputed his liability for the value of the goods obtained from the Sewer Pipe Company upon the ground that, at the time of their respective purchases, that company was in a combination with certain firms, corporations, and companies engaged in the manufacture of Akron pipe, which combination, it was alleged, was in illegal restraint of trade, and forbidden by the principles of the common law, as recognized and enforced both in Ohio and Illinois. The defense was also made that the Sewer Pipe Company was a combination doing business throughout the United States

and between Ohio and Illinois, in the form of a trust, in restraint of trade and commerce among the several states, contrary not only to the anti-trust act of Congress of July 2d, 1890, chap. 647, but contrary to the Illinois anti-trust statute of January 1st, 1893, forbidding, under penalties, the combination of capital, skill, or acts for certain specified purposes. 26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3200. Ill. Laws 1893, p. 182; Hurd's Rev. Stat. (Ill.) 1899, p. 618, title "Criminal Code."

The defense based upon the principles of the common law was overruled in the Connolly Case, the court saying: "Assuming, as defendants contend, that the alleged combination was illegal if tested by the principles of the common law, still it would not follow that they could, at common law, refuse to pay for pipe bought by them under special contracts with the plaintiff. The illegality of such combination did not prevent the plaintiff corporation from selling pipe that it obtained from its constituent companies, or either of them. It could pass a title by a sale to anyone desiring to buy, and the buyer could not justify a refusal to pay for what he bought and received by proving that the seller had previously, in the prosecution of its business, entered into an illegal combination with others in reference, generally, to the sale of Akron pipe." Again, after referring to several cases establishing the general principle that a court will not lend assistance to carry out the terms of an illegal contract, and that one purchasing and receiving goods under a contract, expressed or implied, to pay for them, cannot refuse to pay simply because of the illegal character of his vendor, the court proceeded: "In the present [Connolly] case other considerations must control. This is not an action to enforce or which involves the enforcement of the alleged arrangement or combination between the plaintiff corporation and other corporations, firms, and companies in relation to the sale of Akron pipe. As already suggested, the plaintiff, even if part of a combination illegal at common law, was not, for that reason, forbidden to sell property it acquired or held for sale. The purchases by the defendants had no necessary or direct connection with the alleged illegal combination; for the contracts between the defendants and the plaintiff could have been proven without

any reference to the arrangement whereby the latter became an illegal combination. If, according to the principles of the common law, the Union Sewer Pipe Company could not have sold or passed title to any pipe it received and held for sale, because of an illegal arrangement previously made with other corporations, firms, or companies, a different question would be presented. But we are aware of no decision to the effect that a sale similar to that made by the present plaintiff to the defendants respectively would, in itself, be illegal or void under the principles of the common law. The contracts between the plaintiff and the respective defendants were, in every sense, collateral to the alleged agreement between the plaintiff and the other corporations, firms, or associations whereby an illegal combination was formed for the sale of sewer pipe."

Turning to the defense based on the anti-trust act of Congress, the court in the Connolly Case said: "Much of what has just been said in reference to the first special defense based on the common law is applicable to this part of the case. If the contract between the plaintiff corporation and the other named corporations, persons, and companies, or the combination thereby formed, was illegal under the act of Congress, then all those, whether persons, corporations, or associations, directly connected therewith, became subject to the penalties prescribed by Congress. But the act does not declare illegal or void any sale made by such combination, or by its agents, of property it acquired or which came into its possession for the purpose of being sold,—such property not being, at the time, in the course of transportation from one state to another or to a foreign country. The buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode prescribed by the act of Congress; for Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies, and firms. The contracts

under which the pipe in question was sold were, as already said, collateral to the arrangement for the combination referred to, and this is not an action to enforce the terms of such arrangement. That combination may have been illegal, and yet the sale to the defendants was valid." Further: "Nor can the defendants refuse to pay for what they bought upon the ground that the 7th section of the Sherman act gives the right to any person 'injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful' by the act, to sue and recover treble the damage sustained by him. We shall not now attempt to declare the full scope and meaning of that section of the act of Congress. It is sufficient to say that the action which it authorizes must be a direct one, and the damages claimed cannot be set off in these actions based upon special contracts for the sale of pipe that have no direct connection with the alleged arrangement or combination between the plaintiff and other corporations, firms, or companies. Such damages cannot be said, as matter of law, to have directly grown out of that arrangement or combination, and are, besides, unliquidated. Besides, it is well settled in Illinois that 'unliquidated damages arising out of covenants, contracts, or torts disconnected with plaintiff's claim cannot be set off under the statute.' "

We need not here refer to that part of the Connolly Case relating to the defense based on the anti-trust act of Illinois; for the court adjudged that act to be void because of a certain provision in it which, contrary to the Constitution of the United States, denied the equal protection of the laws to all persons within the jurisdiction of the state, except a named favored class.

The present case is plainly distinguishable from the Connolly Case. In that case the defendant, who sought to avoid payment for the goods purchased by him under contract, had no connection with the general business or operations of the alleged illegal corporation that sold the goods. He had nothing whatever to do with the formation of that corporation, and could not participate in the profits of its business. His contract was to take certain goods at an agreed price, nothing more, and was not in itself illegal, *nor part of nor in execution*

of any general plan or scheme that the law condemned. The contract of purchase was wholly collateral to and independent of the agreement under which the combination had been previously formed by others in Ohio. It was the case simply of a corporation that dealt with an entire stranger to its management and operations and sold goods that it owned to one who wished to buy them. In short, the defense in the Connolly Case was that the plaintiff corporation, although owning the pipe in question and having authority to sell and pass title to the property, was precluded by reason *alone* of its illegal character from having a judgment against the purchaser. We held that that defense could not be sustained, either upon the principles of the common law or under the anti-trust act of Congress.

The case now before us is an entirely different one. The Continental Wall Paper Company seeks, in legal effect, the aid of the court to enforce a contract for the sale and purchase of goods which, *it is admitted by the demurrer, was in fact and was intended by the parties to be based upon agreements that were and are essential parts of an illegal scheme.* We state the matter in this way because the plaintiff, by its demurrer, admits, for the purposes of this case, the truth of all the facts alleged in the third defense. It is admitted by the demurrer to that defense that the account sued on has been made up *in execution of the agreements* that constituted or out of which came the illegal combination formed for the purpose and with effect of both restraining and monopolizing trade and commerce among the several states.

The present suit is not based upon an implied contract of the defendant company to pay a reasonable price for goods that it purchased, but upon agreements, to which both the plaintiff and the defendant were parties, and *pursuant to which* the accounts sued on were made out, and which had for their object, and which it is admitted had directly the effect, to accomplish the illegal ends for which the Continental Wall Paper Company was organized. If judgment be given for the plaintiff the result, beyond all question, will be to give the aid of the court in making effective the illegal agreements that constituted the forbidden combination. These considerations make it evident that the present case is different from the

Connolly Case. In that case the court regarded the record as presenting the question whether a voluntary purchaser of goods at stipulated prices, under a collateral, independent contract, can escape an obligation to pay for them upon the ground *merely* that the seller, which owned the goods, was an illegal combination on trust. We held that he could not, and nothing more touching that question was decided or intended to be decided in the Connolly Case. The question here is whether the plaintiff company can have judgment upon an account which, it is admitted by demurrer, was made up, within the knowledge of both seller and buyer, with direct reference to and in execution of certain agreements under which an illegal combination, represented by the seller, was organized. Stated shortly, the present case is this: The plaintiff comes into court admitting that it is an illegal combination whose operations restrain and monopolize commerce and trade among the states, and asks a judgment that will give effect, as far as it goes, to agreements that constituted that combination, and by means of which the combination purposes to accomplish forbidden ends. We hold that such a judgment cannot be granted without departing from the statutory rule, long established in the jurisprudence of both this country and England, that a court will not lend its aid, in any way, to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality, although the result of applying that rule may sometimes be to shield one who has got something for which, as between man and man, he ought, perhaps, to pay, but for which he is unwilling to pay.

In such cases the aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties. It is of no consequence that the present defendant company had knowledge of the alleged illegal combination and its plans, or was directly or indirectly a party thereto. Its interests must be put out of view altogether when it is sought to have the assistance of the court in accomplishing ends forbidden by the law.

In *Hanauer v. Doane*, 12 Wall. 342, 349, 20 L. ed. 439, 441, this court said: "The whole doctrine of avoiding contracts

for illegality and immorality is founded on public policy. It is certainly contrary to public policy to give the aid of the courts to a vendor who knew that his goods were purchased, or to a lender who knew that his money was borrowed, for the purpose of being employed in the commission of a criminal act, injurious to society or to any of its members."

In *McMullen v. Hoffman*, 174 U. S. 639, 654, 669, 43 L. ed. 1117, 1123, 1128, where the authorities are reviewed and the whole subject carefully examined, the court said: "The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract,"—citing many English and American cases. "The court refuses to enforce such a contract, and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest. It has been often stated in similar cases that the defense is a very dishonest one, and it lies ill in the mouth of the defendant to allege it, and it is only allowed for public considerations and in order the better to secure the public against dishonest transactions. To refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it tends strongly towards reducing the number of such transactions to a minimum. The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law, so far as that protection consists in aiding them to enforce such contracts, the less inclined will they be to enter into them. In that way the public secures the benefit of a rigid adherence to the law." In that case the principle announced in *Coppell v. Hall*, 7 Wall. 542, 558, 19 L. ed. 244, 248, was reaffirmed, namely: "Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objections would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation."

In *Embrey v. Jemison*, 131 U. S. 336, 348, 33 L. ed. 172, 177, where the defendant was sued upon promissory notes given in execution of a previous verbal contract that was illegal, this court said that plaintiff could not "be permitted to withdraw attention from this feature of the transaction by the device of obtaining notes for the amount claimed under that illegal agreement; for they are not founded on any new or independent consideration, but are only written promises to pay that which the obligor had verbally agreed to pay. They do not, in any just sense, constitute a distinct or collateral contract based upon a valid consideration. Nor do they represent anything of value in the hands of the defendant which, in good conscience, belongs to the plaintiff or to his firm. Although the burden of proof is on the obligor to show the real consideration, the execution of the notes could not obliterate the substantive fact that they grew immediately out of and are directly connected with a wagering contract. They must, therefore, be regarded as tainted with the illegality of that contract, the benefits of which the plaintiff seeks to obtain by this suit. That the defendant executed the notes with full knowledge of all the facts is of no moment. The defense he makes is not allowed for his sake, but to maintain the policy of the law. *Coppell v. Hall*, supra."

In *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 45, 46, 48 L. ed. 608, 611, 612, which involved, in part, the question whether a particular contract made in California for the purchase of tiles related to interstate commerce, and was illegal, the court said: "The provision as to this sale is but a part of the agreement, and it is so united with the rest as to be incapable of separation without, at the same time, altering the general purpose of the agreement. The whole agreement is to be construed as one piece, in which the manufacturers are parties as well as the San Francisco dealers, and the refusal to sell on the part of the manufacturers is connected with and a part of the scheme which includes the enhancement of the price of the unset tiles by the San Francisco dealers. The whole thing is so bound together that, when looked at as a whole, the sale of unset tiles ceases to be a mere transaction in the state of California, and becomes a part of a purpose which, when carried out, amounts to and is a contract or

combination in restraint of interstate trade or commerce." So, in *Swift & Co. v. United States*, 196 U. S. 375, 396, 49 L. ed. 518, 524, "The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body, and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately, when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful. *Aikens v. Wisconsin*, 195 U. S. 194, 206, 49 L. ed. 154, 160.

In *Bement & Sons v. National Harrow Co.*, 186 U. S. 70, 87, 88, 46 L. ed. 1058, 1067, 1068, the court, after referring to that section of the act of Congress relating to suits by the Attorney General and by persons injured in their business or property, said: "Assuming that the plaintiff is right so far as regards any suit brought under that act, we are nevertheless of opinion that anyone sued upon a contract may set up as a defense that it is a violation of the act of Congress, and if found to be so, that fact will constitute a good defense to the action. The first section of the act provides that 'every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal.' Every person making such a contract is deemed guilty of a misdemeanor, and on conviction is to be punished by fine or by imprisonment, or both. As the statute makes the contract in itself illegal, no recovery can be had upon it when the defense of illegality is shown to the court. The act provides for the prevention of violations thereof, and makes it the duty of the several district attorneys, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations, and it gives to any person injured in his business or property the right to sue, but that does not prevent a private individual, when sued upon a contract which is void as in violation of the act, from setting it up as a defense, and we think when proved it

is a valid defense to any claim made under a contract thus denounced as illegal."

Again, in the recent case of *Loewe v. Lawlor*, 208 U. S. 274, 301, 52 L. ed. 488, 502, which involved the inquiry whether certain acts could be regarded as in restraint of interstate commerce, the court said: "So that, although some of the means whereby the interstate traffic was to be destroyed were acts within a state, and some of them were, in themselves, as a part of their obvious purpose and effect, beyond the scope of Federal authority, still, as we have seen, the acts must be considered as a whole, and the plan is open to condemnation, notwithstanding a negligible amount of intrastate business might be affected in carrying it out. If the purposes of the combination were, as alleged, to prevent any interstate transportation at all, the fact that the means operated at one end before physical transportation commenced, and at the other end after the physical transportation ended, was immaterial." See also *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 412, 32 L. ed. 979, 985.

The adjudged cases all hold that, upon the question whether the particular contract sought to be enforced arises out of an illegal transaction, the court will not be restricted to a partial statement of the facts, but will consider all the circumstances connected with the transaction, so as to ascertain its real nature. In *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 245, 44 L. ed. 136, 149, the court said that "all the facts and circumstances are, however, to be considered in order to determine the fundamental question, whether the necessary effect of the combination is to restrain interstate commerce."

Upon the whole case, and without further citation of authorities, we adjudge, upon the admitted facts, that the combination represented by the plaintiff in this case was illegal under the anti-trust act of 1890; that it is to be taken as one intended, and which will have the effect, directly to restrain and monopolize trade and commerce among the several states and with foreign states; and that the plaintiff cannot have a judgment for the amount of the account sued on, because, for the reasons we have stated, such a judgment would, in effect, aid the execution of the agreements which constituted that

illegal combination. We consequently hold that the circuit court of appeals properly sustained the third defense and rightly dismissed the suit. Its judgment must be affirmed.

It is so ordered.

MR. JUSTICE HOLMES, with whom concurred Mr. Justice BREWER, Mr. Justice WHITE and Mr. Justice PECKHAM, dissenting:

This action is for goods admitted to have been sold and delivered by the plaintiff to the defendant, and the question arises, as has been explained, on demurrer to the third defense. The elements of that defense may be stated in a few words. Nearly all the manufacturers of wall paper in the United States formed a combination which, under the present policy of the law, was an illegal attempt to restrain and monopolize trade in and among the several states. As a part of the scheme the plaintiff corporation was created, which, by the agreement, became the purchaser of the products of the constituent companies; and was to sell the same, although the constituent companies continued to manufacture and to carry on the business of soliciting orders. The only material facts about this agreement are that under it the plaintiff got title to the goods, that it fixed prices at which goods were to be sold, and that it contemplated compelling the jobbers and others who bought to purchase at those prices, if they were to get any paper at all. The conspirators threatened, and had the power, to drive any jobber out of business who did not come in.

In pursuance of the combination and its purpose the defendant, a jobbing house, and all other jobbers, were compelled to sign a contract which, in effect, bound them to buy all the wall paper needed in their business from the plaintiff at the above-mentioned prices, and which made it an "essential condition of this agreement" that they should not sell at lower prices or upon better terms than those at which the plaintiff sold. After these two contracts were made the defendant ordered the goods in question at the prices named. It is alleged that those prices were unreasonable, and it is alleged, repeatedly and with much detail, that all the arrangements were made and all the business was done in furtherance

of the plan set forth, contrary to the law of the United States and of the states concerned, and in violation of the defendant's rights, this suit being the final step in the attempt to carry out the plan.

It seems to me that the foregoing facts show no defense. I will consider them in their successive degrees of connection with the affair, and, in the first place, will take up the terms of the actual contract in suit. These were ordinary parol sales made by the owner of goods. The suit was not upon the general agreement between the plaintiff and defendant. That by itself sold nothing, and it may be questioned whether it purported absolutely to bind the defendant to buy a roll of paper. See *Dennis v. Slyfield*, 54 C. C. A. 520; *Sterling Coal Co. v. Silver Spring Bleaching & Dyeing Co.*, 162 Fed. 848, 850. The actual contracts by which the plaintiff bound itself to deliver, and the sales under which it did deliver, the specific goods for which it seeks to recover the price, were made after the making of the general agreement, as it is apparent on the face of that agreement that they must have been, and as is alleged by the answer in so many words. Each was a separate transaction. There is nothing alleged concerning the terms of these parol sales that has any element of illegality about it.

Next, as to the effect of the general agreement between the plaintiff and defendant. It is alleged that after it was made the members of the combination solicited, received, and filled orders, and charged the prices fixed in the original combination agreement. It is not alleged that either agreement was referred to, even by implication. The sales are left by the answer as so many distinct transactions. But, if in order to help the defendant to escape, we are to infer that the orders were given with implied reference to the general contract, what effect could such a reference have? Plainly, only to fix the price; and for this purpose it was simply a schedule, figures on a piece of paper or in the memory of the parties, which were adopted by pointing to them in some way, as if they had been written on a blackboard. It did not matter whether the document pointed at was lawful or unlawful, as the whole business was done by the later contracts. See *Interstate Consol. Street R. Co. v. Massachusetts*, 207 U. S. 79, 84, 85, 52 L. ed. 111, 114, 115.

If the condition in the general agreement between the plaintiff and defendant made it bad, still it went only to that agreement and to the plaintiff's promise to sell at certain prices, not to any subsequent sales, or to the defendant's title to goods got under subsequent sales. If it had been incorporated in any way into the specific sales, it would be necessary to consider the case of *Cincinnati, P. B. S. & P. Packet Co. v. Bay*, 200 U. S. 179, 185, 50 L. ed. 428, 433. But no such incorporation is alleged, or, in any probability, could have been alleged. So I think that I may assume that the parcel sales were made no worse, on their face, by any reference to the content of the general agreement. And I may add that the unlawfulness of the general agreement would not make the sales bad from the outside, so to speak, if that was all that there was against them. A lawful purchase is not made unlawful merely by being the fulfilment of an unlawful contract.

It has been suggested that the plaintiff was not the real seller, and only got its standing from the general agreement with the defendant, and that therefore it had to rely upon an illegal contract to make out its case. But the defense does not deny that the plaintiff became the owner of the goods, or that the manufacturers sold in its name, as the original combination provided. It is true that it says that the arrangements were made with a view of disguising the real transaction and purpose, and that really the business was to be done by the manufacturers, as I have stated. But it adds that payments were to be made to the plaintiff, and it nowhere suggests that the first contract set forth did not operate, or that the plaintiff did not get the title it professed to transfer. Its illegality would not prevent the title passing. If the defendant meant to deny that it bought from the plaintiff goods which the plaintiff owned, it was very easy to deny it and to leave the plaintiff to set up the agreement if it did not join issue, as it naturally would. As the defense stands, I think it means, as I have no doubt is the fact, that the technical legal title to the goods was in the plaintiff, and that the defendant purported to contract with it, the manufacturers selling in its name.

I now pass to the more remote considerations that are sup-

posed to have a greater effect. It is said that the specific sales, the general agreement, and the original combination, all are steps in one illegal plan, and that the plan gives character to the whole. But we must be more precise. The plaintiff alone was party to the plan. The defendant represents itself as a victim, and says that the plan was against its rights. On what ground, then, does the illegal purpose of the plaintiff warrant the defendant in professing to buy its goods and then refusing to pay for them?

The plaintiff's unlawful purpose did not make it unlawful to buy the plaintiff's goods. It is decided, if decision is necessary, that a purchaser cannot escape merely on the ground that the seller is an unlawful trust. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. ed. 679; *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U. S. 390, 397, 51 L. ed. 241, 244. I repeat that it is not alleged that the defendant in any way shared the plaintiff's intent, but to go further than I need, I will assume that it may be taken to have made the general contract with knowledge of that intent. But it cannot be contended that, therefore, it was party to a transaction illegal for that reason. Whenever a party knows that he is buying from an illegal trust, and still more, when he buys at a price that he thinks unreasonable, but is compelled to pay in order to get the goods he needs, he knows that he is doing an act in furtherance of the unlawful purpose of the trust, which always is to get the most it can for its wares. But that knowledge makes no difference, because the policy of not furthering the purpose of the trust is less important than the policy of preventing people from getting other people's property for nothing when they purport to be buying it. And if knowledge of the purchaser that he is furthering the purpose of the trust makes no difference, it makes no difference whether he is glad or sorry for the result. A man does not make conduct otherwise lawful unlawful simply by yearning that it should be so. In this case, however, the defendant was an unwilling accessory, exactly as Dee was in the *Connolly Case*.

The effect of the defendant's knowledge of the plaintiff's scheme is no greater because it signed the illegal general contract. I think that I have shown that the illegality of that

contract, taken by itself, did not make the specific sale illegal, and from the point of view that all that was done was a carrying out of the plaintiff's illegal scheme, it does not matter to the legality of the sales whether a particular previous step was legal or not. If knowledge that the plaintiff was attempting to monopolize, and that it sold at prices fixed in aid of the intent, would not exonerate the defendant when it yielded to its necessities and bought, the same knowledge would have no greater effect if the same necessities led it to agree beforehand to do what it did.

Perhaps, in order to answer every aspect that this rambling defense presents, I ought to say in conclusion that the allegations that the price was unreasonable, and that the plaintiff threatened and had power to drive jobbers out of business that did not come into its arrangement, are not stated in such form as to make a case of duress. I think that that would have been the strongest ground on which the defense could have been put. Courts and legislation sometimes have recognized that the so-called freedom to contract or not may be made illusory by the economic situation of one of the parties. *Schlemmer v. Buffalo, R. & P. R. Co.* 205 U. S. 1, 12, 51 L. ed. 681, 686. It would be extending the recognition further than it yet has been extended, so far as I am aware, to apply it to a case like this. But I express no opinion upon its possible application, because, as I have said, the allegations are not directed to that end, and do not sufficiently show that the specific purchases were induced by fear. Moreover, as such duress, like fraud, goes only to motives (*The Eliza Lines*, 199 U. S. 119, 131, 50 L. ed. 115, 120) if the frightened or defrauded party would rescind, he must restore the consideration, or at least be ready to pay the reasonable price, of neither of which is there any hint.

I think that this decision must mean that *Connolly v. Union Sewer Pipe Co.* *supra*, ought to have been decided the other way. There, as here, there was, or was assumed to be, an illegal trust. In furtherance of the purposes of the trust a general agreement was made between the trust and the defendants, the purchasers, which required defendants to buy from the plaintiff alone at prices alleged to be unreasonable, they receiving a rebate upon that consideration, and which

fixed a price at which the defendants would sell. There was just as much of a scheme and just the same scheme in that case as in this. In both the defendants co-operated as victims to the monopoly in precisely the same way. The facts spoke for themselves, and were the same. Nothing is added to the case by calling the arrangements set forth a scheme, but similar language was used in the former case, as appears from the record. The contract will be found in the same record. It was assigned as error and argued that the circuit court ruled that the said contract, again set forth, was not void. For these reasons I feel compelled to dissent from the judgment of the court. I am authorized to say that Mr. Justice BREWER, Mr. Justice WHITE, and Mr. Justice PECKHAM concur in this dissent.

MR. JUSTICE BREWER, dissenting:

Concurring in the views expressed by Mr. Justice HOLMES, it seems to me another matter is worthy of consideration.

The transactions between the plaintiff and defendant were, as held by the court, in violation of the anti-trust act (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200). That act defines the rights and liabilities of the parties. The first three sections prohibit contracts and combinations in restraint of trade and monopolies, declare a person violating the provisions of these sections guilty of a misdemeanor, and prescribe the punishment. Section 4 gives power to the circuit courts of the United States to prevent and restrain violations of the act. Section 6 provides for a forfeiture of property owned under any contract or combination or pursuant to any conspiracy, and seized while in course of transportation. Section 7 declares that any person injured in his business or property by reason of anything forbidden or declared to be unlawful in the act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold damages by him sustained.

The present case comes within the proposition that "where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment

or the remedy can be only that which the statute prescribes." *Farmer's & M. Nat. Bank v. Dearing*, 91 U. S. 29, 35, 23 L. ed. 196, 199; *Barnet v. Muncie Nat. Bank*, 98 U. S. 555, 25 L. ed. 212. These two cases arose under the national banking act (13 Stat. at L. 99, chap. 106), and illustrate the doctrine referred to. That act prescribed the rate of interest which might be taken by national banks, and added that knowing and receiving a greater rate of interest should forfeit the entire interest; or, if the interest had been paid, that the person paying might recover in an action of debt twice the amount of interest thus paid. These cases held that relief for a violation of the statute was a forfeiture of the interest due and not paid, or, in case the interest had been paid, an action of debt to recover double the amount paid. See also *Oates v. First Nat. Bank*, 100 U. S. 239, 25 L. ed. 580.

In *Stephens v. Monongahela Nat. Bank*, 111 U. S. 197, 28 L. ed. 399, it was decided that the remedy prescribed by the statute was exclusive. In *Driesbach v. Second Nat. Bank*, 104 U. S. 52, 26 L. ed. 658, it was held that usurious interest paid a national bank on renewing a series of notes could not, in an action by the bank on the last of them, be applied in satisfaction of the principal of the debt.

Now, the remedies given in the anti-trust act are three in number: First, a criminal prosecution; second, a forfeiture of property; and, third, an action by any person injured to recover threefold the damages by him sustained. These, being the remedies prescribed, are exclusive. The defendant sought neither of these remedies. It was not so anxious for the public welfare as to make complaint and secure criminal proceedings. There was no property to be forfeited. It did not seek to recover threefold the damage it had sustained, but only to avoid paying for the property it had purchased. The reason therefor is suggested in the opinion of the circuit court of appeals (78 C. C. A. 578):

"The averment that they paid 50 per cent more for their gross purchases in consequence of the illegal combination has little merit in it, moral or otherwise. They doubtless sold again at the great minimum profit they agreed to exact from retailers, and the retailers later exacted the undue profit from the consuming public."

Something of the same idea of the exclusiveness of a statutory remedy finds expression in *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. ed. 553, 9 A. & E. Ann. Cas. 1075, in which it was held that a shipper could not maintain an action at common law for excessive and unreasonable freight charges exacted on interstate shipments, where the rates charged were those which had been duly fixed by the carrier according to the interstate commerce act, and had not been found to be unreasonable by the Interstate Commerce Commission, and this notwithstanding the provision in § 22 of the act to regulate interstate commerce: "Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." [24 Stat. at L. 387, chap. 104, U. S. Comp. Stat. 1901, p. 3171.]

SECTION 4

CONTRACTS OF BUYER TO KEEP UP PRICE ON RE-SALE.

DR. MILES MEDICAL COMPANY v. PARK & SONS CO.

(Supreme Court of United States, 1911. 220 U. S. 373.)

Statement by Mr. Justice HUGHES:

This is a writ of certiorari to review a judgment of the circuit court of appeals for the sixth circuit which affirmed a judgment of the circuit court, dismissing, on demurrer, the bill of complaint for want of equity. 90 C. C. A. 579, 164 Fed. 803.

The complainant, Dr. Miles Medical Company, an Indiana corporation, is engaged in the manufacture and sale of proprietary medicines, prepared by means of secret methods and formulas, and identified by distinctive packages, labels, and trademarks. It has established an extensive trade throughout the United States and in certain foreign countries. It has been its practice to sell its medicines to jobbers and wholesale druggists, who in turn sell to retail druggists for sale to the consumer. In the case of each remedy, it has fixed not only

the price of its own sales to jobbers and wholesale dealers, but also the wholesale and retail prices. The bill alleged that most of its sales were made through retail druggists, and that the demand for its remedies largely depended upon their good will and commendation, and their ability to realize a fair profit; that certain retail establishments, particularly those known as department stores, had inaugurated a "cut-rate" or "cut-price" system which had caused "much confusion, trouble, and damage" to the complainant's business, and "injuriously affected the reputation" and "depleted the sales" of its remedies; that this injury resulted "from the fact that the majority of retail druggists as a rule cannot, or believe that they cannot, realize sufficient profits" by the sale of the medicines "at the cut-prices announced by the cut-rate and department stores," and therefore are "unwilling to, and do not keep" the medicines "in stock," or, "if kept in stock, do not urge or favor sales thereof, but endeavor to foist off some similar remedy or substitute, and from the fact that in the public mind an article advertised or announced at 'cut' or 'reduced' price from the established price suffers loss of reputation and becomes of inferior value and demand."

It was further alleged that for the purpose of protecting "its trade sales and business" and of conserving "its good will and reputation," the complainant had established a method "of governing, regulating, and controlling the sale and marketing" of its remedies, which is thus described in the bill:

"Contracts in writing were required to be executed by all jobbers and wholesale druggists to whom your orator sold its aforesaid remedies, medicines, and cures, of the following tenor and effect:

"Consignment Contract—Wholesale.

"The Dr. Miles Medical Company.

"This agreement made by and between The Dr. Miles Medical Company, a corporation, of Elkhart, Indiana, hereafter referred to as the proprietor, and ——— herein-after referred to as the consignee, witnesseth:

"That the said proprietor hereby appoints said consignee one of its wholesale distributing agents, and agrees to consign

to such consignee for sale for the account of said proprietor such goods of its manufacture as the proprietor may deem necessary, the title thereto and property therein to be and remain in the proprietor absolutely until sold under and in accordance with the provisions hereof, and all unsold goods to be immediately returned to said proprietor on demand and the cancellation of this agreement. Said goods to be invoiced to consignee at the following prices:

“Medicines of which the retail price is \$1, \$8 per dozen.

“Medicines (if any) of which the retail price is 50 cents, \$4 per dozen.

“Medicines of which the retail price is 25 cents, \$2 per dozen.

“Freight on all orders, the invoice price of which amounts to \$100 or more, to be prepaid by the proprietor; otherwise, freight to be paid by consignee.

“Said consignee agrees to confine the sale of all goods and products of the said proprietor strictly to, and to sell only to, the designated retail agents of said proprietor as specified in lists of such retail agents furnished by said proprietor and alterable at the will of said proprietor, and to faithfully and promptly account and pay to the proprietor the proceeds of all sales, after deducting as full compensation for all services, charges, and disbursements a commission of 10 per cent of the invoice value, and a further commission of 5 per cent on the net amount of each consignment, after deducting said 10 per cent commission on all advances on account remitted within ten days from date of any consignment, it being agreed between the parties hereto that such advances shall in no manner affect the title to such goods, which title shall remain in the proprietor as if no such advances had been made; provided that such advances shall be repaid to said consignee should the said proprietor terminate this agreement and the return of any unsold goods on which advances have been made. Said consignee guarantees the payment for all goods sold under this agreement, and agrees to render a full account and remit the net proceeds on the first day of each month of and for the sales of the month preceding. Failure to make such accounting and remittance within ten days from the first of each month shall render the whole account payable and sub-

ject to draft, but the proceeds of such draft shall not affect the title of any unsold goods, which shall remain in the proprietor until actually sold, as herein provided.

"It is further agreed that the consignee shall furnish the proprietor from time to time upon demand full statements of the stock of goods of the proprietor on hand on any date specified, and that a failure to furnish such statements within ten days from date of such demand shall be a sufficient cause for the cancelation of this agreement, and a demand for the return of the consigned goods.

"It is further agreed that the proprietor will cause each retail package of its goods to be identified by a number, and said consignee hereby agrees to furnish the said proprietor full reports upon proper cards or blanks furnished by said proprietor of the disposition of each dozen or fraction of such goods by means of the identifying numbers, specifying the names and addresses of the retail agents to whom such goods have been delivered and the dates of such delivery, and to send such reports to said proprietor at least semimonthly, and at any other time on the request of said proprietor.

"It is understood and agreed between the parties hereto that the commissions herein specified shall not be considered as earned by said consignee upon any goods of said proprietor which shall have been delivered to dealers not authorized agents of said proprietor, as per list of such agents, or upon any goods whose disposition by said consignee shall not have been properly reported as herein provided, or sold at prices less than the prices authorized, and that said consignee shall not credit any such commissions when making remittances on consignment account provided notice has been given by said proprietor that such commissions are unearned; and that if such unearned commissions have been deducted by said consignee in making advance payments or monthly remittances on account, they shall be charged back to said consignee and credited and paid to said proprietor. It is understood that violation or nonobservance of any provision hereof by the consignee shall make this agreement terminable and all unsold goods returnable at the option of the proprietor.

"It is agreed that the goods of said proprietor shall be sold by said consignee only to the said retail or wholesale agents

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of said proprietor, as per list furnished, at not less than the following prices, to wit:

“Medicines of which the retail price is \$1, \$8 per dozen.

“Medicines (if any) of which the retail price is 50 cents, \$5 per dozen.

“Medicines of which the retail price is 25 cents, \$2 per dozen.

“Provided, that said consignee may allow a cash discount not exceeding 1 per cent, if paid within ten days from date of invoice, and that when sales at one time and at one invoice amount to \$15 or more, the said consignee may allow 3 per cent trade discount, and if said purchase amounts to \$50 or more, 5 per cent trade discount, all without cost to the proprietor, and if such \$50 quantity shall be shipped direct to the retail purchaser from the laboratory of said proprietor, on the order from said wholesale distributing agent, freight will be prepaid by the proprietor, but not otherwise.

“This contract will take effect when the original, duly signed by the consignee, has been received and accepted by The Dr. Miles Medical Company, at Elkhart, Indiana.

“Done under our hands — —, A. D. 1907.

“Fill in date on above line.

“The Dr. Miles Medical Company.

“———, wholesale dealer.

“Sign your name on above line.

“Original. Return in inclosed envelope.”

“And written contracts were required with all retailers of your orator's said proprietary remedies, medicines, and cures, as follows:

“Retail Agency Contract.

“The Dr. Miles Medical Company.

“This agreement between The Dr. Miles Medical Company of Elkhart, Indiana, and ———, of ———,

“Retailer's name on above line. Town. State.

“hereinafter referred to as retail agent, witnesseth:

“Appointed Agent.

“The said Dr. Miles Medical Company hereby appoints said retail dealer as one of the retail distributing agents of its

proprietary medicines, and agrees that said retail agent may purchase the proprietary medicines manufactured by said Dr. Miles Medical Company (each retail package of which the said company will cause to be identified by a number) at the following prices, to wit:

“Wholesale Prices.

“Medicines of which the retail price is \$1, \$8 per dozen.

“Medicines of which the retail price is 50 cents, \$4 per dozen.

“Medicines of which the retail price is 25 cents, \$2 per dozen.

“Quantity Discount.

“Provided that when purchases at one time and on one invoice amount to \$15 (or more), wholesale distributing agents are authorized to allow 3 per cent trade discount; if such purchase amounts to \$50 (or more) 5 per cent trade discount will be allowed; and if such \$50 quantity be shipped direct to the purchaser from the laboratory of said Dr. Miles Medical Company for the account of such wholesale agent, freight will be prepaid, but not otherwise.

“Full Price.

“In consideration whereof said retail agent agrees in no case to sell or furnish the said proprietary medicines to any person, firm, or corporation whatsoever, at less than the full retail price as printed on the packages, without reduction for quantity; and said retail agent further agrees not to sell the said proprietary medicines at any price to wholesale or retail dealers not accredited agents of the Dr. Miles Medical Company.

“Violation.

“It is further agreed between the parties hereto that the giving of any article of value, or the making of any concession by means of trading stamps, cash register coupons, or otherwise, for the purpose of reducing the price above agreed upon, shall be considered a violation of this agreement, and further it is agreed between the parties hereto that the Dr. Miles Medical Company will sustain damage in the sum of twenty-five dollars (\$25) for each violation of any provision of this agreement, it being otherwise impossible to fix the measure of damage.

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"This contract will take effect when a duplicate thereof, duly signed by the retail agent, has been received and approved by The Dr. Miles Company, at its office at Elkhart, Indiana.

"Done under our hands ———, —, A. D. 1907.

"Fill in date on above line.

"The Dr. Miles Medical Company.

"———, retail dealer.

"Sign your name on above line in ink.

"To Retail Dealer:

"Paste printed label, giving name and address, that your name may be correctly listed.

"Duplicate. Keep for reference."

As an aid to the maintenance of the prices thus fixed, the company devised a system for tracing and identifying through serial numbers and cards, each wholesale and retail package of its products.

It was alleged that all wholesale and retail druggists, "and all dealers in proprietary medicines," had been given full opportunity, without discrimination, to sign contracts in the form stated, and that such contracts were in force between the complainant "and over four hundred jobbers and wholesalers and twenty-five thousand retail dealers in proprietary medicines in the United States."

The defendant is a Kentucky corporation conducting a wholesale drug business. The bill alleged that the defendant had formerly dealt with the complainant, and had full knowledge of all the facts relating to the trade in its medicines; that it had been requested, and refused, to enter into the wholesale contract required by the complainant; that in the city of Cincinnati, Ohio, where the defendant conducted a wholesale drug store, there were a large number of wholesale and retail druggists who had made contracts of the sort described, with the complainant, and kept its medicines on sale pursuant to the agreed terms and conditions. It was charged that the defendant, "in combination and conspiracy with a number of wholesale and retail dealers in drugs and proprietary medicines, who have not entered into said wholesale and retail contracts" required by the complainant's system, and

solely for the purpose of selling the remedies to dealers "to be advertised, sold, and marketed at cut rates," and "to thus attract and secure custom and patronage for other merchandise, and not for the purpose of making or receiving a direct money profit" from the sales of the remedies, had unlawfully and fraudulently procured them from the complainant's "wholesale and retail agents" by means "of false and fraudulent representations and statements, and by surreptitious and dishonest methods, and by persuading and inducing, directly and indirectly," a violation of their contracts.

It is further charged that the defendant, having procured the remedies in this manner, had advertised and sold them at less than the jobbing and retail prices established by the complainant; and that, for the purpose of concealing the source of supply, the identifying serial numbers, which had been stamped upon the labels and cartons, had been obliterated by the defendant or by those acting in collusion with the defendant, and the labels and cartons had been mutilated, thus rendering the list of ailments and directions for use illegible, and that the remedies in this condition were sold both to the wholesale and retail dealers, and ultimately to buyers for use at cut rates.

The bill prayed for an injunction restraining the defendant from inducing or attempting to induce any party to any of the said "wholesale or retail agency contracts" to "violate or break the same, or to sell or deliver to the defendant, or to any person for it," the complainant's remedies; from procuring or attempting to procure in any way any of these remedies from wholesale or retail dealers who had executed the contracts; from advertising, selling, or offering for sale the remedies obtained by any of the described means at less "than the established retail price thereof," or to dealers who had not entered into contract with the complainant; from in any way obliterating, mutilating, removing, or covering up the labels and cartons upon the bottles containing the remedies, and from making sales without such labels and cartons, and the letter press and numerals thereon, being intact. There was also a prayer for an accounting.

The defendant demurred to the bill generally for want of equity, and also specially to that portion of the bill which

related to the mutilation and destruction of the identifying numbers and labels.

The circuit court sustained the demurrers and dismissed the bill, and its judgment was affirmed by the circuit court of appeals.

MR. JUSTICE HUGHES, after making the above statement, delivered the opinion of the court:

The complainant, a manufacturer of proprietary medicines which are prepared in accordance with secret formulas, presents by its bill a system, carefully devised, by which it seeks to maintain certain prices fixed by it for all the sales of its products, both at wholesale and retail. Its purpose is to establish minimum prices at which sales shall be made by its vendees and by all subsequent purchasers who traffic in its remedies. Its plan is thus to govern directly the entire trade in the medicines it manufactures, embracing interstate commerce as well as commerce within the state respectively. To accomplish this result it has adopted two forms of restrictive agreements limiting trade in the articles to those who become parties to one or the other. The one sort of contract, known as "Consignment Contract—Wholesale," has been made with over four hundred jobbers and wholesale dealers, and the other, described as "Retail Agency Contract," with twenty-five thousand retail dealers in the United States.

The defendant is a wholesale drug concern which has refused to enter into the required contract, and is charged with procuring medicines for sale at "cut prices" by inducing those who have made the contracts to violate the restrictions. The complainant invokes the established doctrine that an actionable wrong is committed by one who maliciously interferes with a contract between two parties, and induces one of them to break that contract, to the injury of the other, and that, in the absence of an adequate remedy at law, equitable relief will be granted. *Angle v. Chicago, St. P. M. & O. R. Co.* 151 U. S. 1, 38 L. ed. 55; *Bitterman v. Louisville & N. R. Co.* 207 U. S. 205, 52 L. ed. 171, 12 A. & E. Ann. Cas. 693.

The principal question is as to the validity of the restrictive agreements.

Preliminarily there are opposing contentions as to the con-

struction of the agreements, or, at least, of that made with jobbers and wholesale dealers. The complainant insists that the "consignment contract" contemplates a true consignment for sale for account of the complainant, and that those who make sales under it are the complainant's agents, and not its vendees. The court below did not so construe the agreement, and considered it an effort "to disguise the wholesale dealers in the mask of agency, upon the theory that in that character one link in the system for the suppression of the 'cut rate' business might be regarded as valid," and that under this agreement "the jobber must be regarded as the general owner, and engaged in selling for himself, and not as a mere agent of another." 90 C. C. A. 581.

There are certain allegations in the bill which do not accord with the complainant's argument. Thus, it is alleged that it "has been and is the uniform custom" of the complainant "to sell said medicines, remedies, and cures to jobbers and wholesale druggists, who in turn sell and dispose of the same to retail druggists for sale and distribution to the ultimate purchaser or consumer." And in setting forth the form of the agreement in question it is alleged that it was "required to be executed by all jobbers and wholesale druggists to whom your orator sold its aforesaid remedies, medicines, and cures." It is further stated that, as a means of maintaining "said list of prices," cards bearing serial identifying numbers are placed in each package of remedies "sold to jobbers and wholesale druggists." But it is also alleged in the bill that under the provisions of the contract the title to the medicines remained in the complainant "until actual sale in good faith to retail dealer, as therein provided."

Turning to the agreement itself, we find that it purports to appoint the party with whom it is made one of the complainant's "wholesale distributing agents," and it is agreed that the complainant, as proprietor, shall consign to the agent "for sale for the account of said proprietor" such goods as it may deem necessary, "the title thereto to remain in the proprietor absolutely until sold under and in accordance with the provisions hereof, and all unsold goods to be immediately returned to said proprietor on demand and the cancelation of this agreement." The goods are to be invoiced to the con-

signee at stated prices, which are the same as the minimum prices at which the consignee is allowed to sell. It is also agreed that the consignee shall "faithfully and promptly account and pay to the proprietor the proceeds of all sales, after deducting as full compensation . . . a commission of 10 per cent of the invoice value, and a further commission of 5 per cent on the net amount of each consignment after deducting the said 10 per cent commission on all advances on account remitted within ten days from the date of any consignment," such advances, however, not to affect the title to the goods, and to be repaid should the agreement be terminated and unsold goods, on which advances had been made, be returned. The consignee guarantees payment for all goods sold, and promises "to render a full account and remit the net proceeds on the first day of each month of and for the sales of the month preceding."

The consignee agrees "to sell only to the designated retail agents of said proprietor, as specified in lists of such retail agents furnished by said proprietor, and alterable at the will of said proprietor." A further provision permits sales "only to the said retail or wholesale agents of said proprietor, as per list furnished." No time is fixed for the duration of the agreement.

It is urged that the additional commission of 5 per cent is to induce, through the guise of "advances," payment for the goods before sales are made, and that unsold goods are to be returned only on the complainant's demand and the cancellation of the agreement. But the consignee is not bound to make these "advances," and it is distinctly provided that he shall not acquire title by making them. It is also said that the consignee may sell at prices higher than those listed, but he is bound by the agreement to account for "the proceeds of all sales," less the stipulated commissions. Nor is the provision as to the time for accounting and remittance of net proceeds to be regarded as inconsistent with agency, in the absence of a showing that, in the actual transactions and accounts, the consignee was treated as selling on his own behalf and paying as purchaser.

If, however, we consider the "consignment contract" as one which in legal effect provides for consignments of goods

to be sold by an agent for his principal's account, and that the tenor of the agreement, as set forth, must be taken to override the inconsistent general allegations to which we have referred, this alone would not be sufficient to support the bill.

The bill charges that the defendant has unlawfully and fraudulently procured the proprietary medicines from the complainant's "wholesale and retail agents" in violation of their contracts. But it does not allege that the goods procured by the defendant from "wholesale agents" were goods consigned to the latter for sale. The description "wholesale agent" refers to those who have signed the "consignment contract." This contract, however, permits one "wholesale agent" to sell to another "wholesale agent." For all that appears, the goods procured by the defendant may have been purchased by the defendant's vendors from other wholesale agents. The bill avers that prior to the introduction of the described system, the defendant, a wholesale house, had dealt in the remedies, and had purchased them from the complainant and from "wholesale druggists and jobbers." There is nothing in the bill which is inconsistent with such an actual course of dealing, permitted by the agreement itself, with respect to the wholesale dealers who have signed it. But the goods which one wholesale agent purchased from another wholesale agent would not be held for sale as consigned goods belonging to the complainant, and to be accounted for as such; and their sale by the wholesale dealer, who had acquired title, would be made for his own account, and not for that of the complainant. The allegations of the bill and the plain purpose of the system of contracts do not permit the conclusion that it was intended that wholesale dealers purchasing goods in this way should be free to sell to anyone at any price. Evidently it was not contemplated that the restrictions of the system should be escaped in such a simple manner. But if the restrictions of the "consignment contract" as to prices and vendees are to be deemed to apply to the sale of goods which one wholesale dealer has purchased from another, it is evident that the validity of the restrictions in this aspect must be supported on some other ground than that such sale is made by the wholesale dealer as the agent of the complainant. The

case presented by the bill cannot properly be regarded as one for reducing breach of trust by an agent.

The other form of contract adopted by the complainant, while described as a "retail agency contract," is clearly an agreement looking to sale, and not to agency. The so-called "retail agents" are not agents at all, either of the complainant or of its consignees, but are contemplated purchasers who buy to sell again; that is, retail dealers. It is agreed that they may purchase the medicines manufactured by the complainant at stated prices. There follows this stipulation:

"In consideration whereof said retail agent agrees in no case to sell or furnish the said proprietary medicines to any person, firm, or corporation whatsoever at less than the full retail price as printed on the packages, without reduction for quantity; and said retail agent further agrees not to sell the said proprietary medicines at any price to wholesale or retail dealers not accredited agents of the Dr. Miles Medical Company."

It will be noticed that the "retail agents" are not forbidden to sell either to wholesale or retail dealers if these are "accredited agents" of the complainant, that is, if the dealers have signed either of the two contracts the complainant requires. But the restriction is intended to apply whether the retail dealers have bought the goods from those who held under consignment or from other dealers, wholesale or retail, who had purchased them. And in which way the "retail agents" who supplied the medicine to the defendant had bought them is not shown.

The bill asserts complainant's "right to maintain and preserve the aforesaid system and method of contracts and sales adopted and established by it." It is, as we have seen, a system of interlocking restrictions by which the complainant seeks to control not merely the prices at which its agents may sell its products, but the prices for all sales by all dealers at wholesale or retail, whether purchasers or subpurchasers, and thus to fix the amount which the consumer shall pay, eliminating all competition. The essential features of such a system are thus described by Mr. Justice LUTON (then circuit judge), in the opinion of the circuit court of appeals in the case of *John D. Park & Sons Co. v. Hartman*, 12 L. R. A. (N. S.)

on page 147, 82 C. C. A. 158: "The contracting wholesalers or jobbers covenant that they will sell to no one who does not come with complainant's license to buy, and that they will not sell below a minimum price dictated by complainant. Next, all competition between retailers is destroyed, for each such retailer can obtain his supply only by signing one of the uniform contracts prepared for retailers, whereby he covenants not to sell to anyone who proposes to sell again unless the buyer is authorized in writing by the complainant, and not to sell at less than a standard price named in the agreement. Thus all room for competition between retailers, who supply the public, is made impossible. If these contracts leave any room at any point of the line for the usual play of competition between the dealers in the product marketed by complainant, it is not discoverable. Thus a combination between the manufacturer, the wholesalers, and the retailers, to maintain prices and stifle competition, has been brought about."

That these agreements restrain trade is obvious. That, having been made, as the bill alleges, with "most of the jobbers and wholesale druggists and a majority of the retail druggists of the country," and having for their purpose the control of the entire trade, they relate directly to interstate as well as intrastate trade, and operate to restrain trade or commerce among the several states, is also clear. *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136; *E. Bement & Sons v. National Harrow Co.* 186 U. S. 92, 46 L. ed. 1069; *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. ed. 608; *Swift & Co. v. United States*, 196 U. S. 375, 49 L. ed. 518.

But it is insisted that the restrictions are not invalid either at common law or under the act of Congress of July 2, 1890, chap. 647, 26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3200, upon the following grounds, which may be taken to embrace the fundamental contentions for the complainant: (1) That the restrictions are valid because they relate to proprietary medicines manufactured under a secret process; and (2) that, apart from this, a manufacturer is entitled to control the prices on all sales of his own products.

First. The first inquiry is whether there is any distinction,

with respect to such restrictions as are here presented, between the case of an article manufactured by the owner of a secret process and that of one produced under ordinary conditions. The complainant urges an analogy to right secured by letters patent. *E. Bement & Sons v. National Harrow Co.* 186 U. S. 70, 46 L. ed. 1058. In the case cited, there were licenses for the manufacture and sale of articles covered by letters patent, with stipulations as to the prices at which the licensee should sell. The court said, referring to the act of July 2, 1890 (p. 92): "But that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act we have no doubt was never contemplated by its framers."

But whatever rights the patentee may enjoy are derived from statutory grant under the authority conferred by the Constitution. This grant is based upon public considerations. The purpose of the patent law is to stimulate invention by protecting inventors for a fixed time in the advantages that may be derived from exclusive manufacture, use, and sale. As was said by Chief Justice MARSHALL in *Grant v. Raymond*, 6 Pet., pp. 241-243, 8 L. ed. 384, 385: "It is the reward stipulated for the advantages derived by the public for the exertions of the individual, and is intended as a stimulus to those exertions. . . . The public yields nothing which it has not agreed to yield; it receives all which it has contracted to receive. The full benefit of the discovery, after its enjoyment by the discoverer for fourteen years, is preserved; and for his exclusive enjoyment of it during that time the public faith is pledged. . . . The great object and intention of the act is to secure to the public the advantages to be derived from the discoveries of individuals, and the means it employs are the compensation made to those individuals for the time and labor devoted to these discoveries, by the exclusive right to make, use, and sell the things discovered for a limited time."

The complainant has no statutory grant. So far as appears, there are no letters patent relating to the remedies in question.

The complainant has not seen fit to make the disclosure required by the statute, and thus to secure the privileges it confers. Its case lies outside the policies of the patent law, and the extent of the right which that law secures is not here involved or determined.

The complainant relies upon the ownership of its secret process and its rights are to be determined accordingly. Anyone may use it who fairly, by analysis and experiment, discovers it. But the complainant is entitled to be protected against invasion of its rights in the process by fraud or by breach of trust or contract. *Tabor v. Hoffman*, 118 N. Y. 36, 16 Am. St. Rep. 740; *Chadwick v. Covell*, 151 Mass. 190, 6 L. R. A. 839, 21 Am. St. Rep. 442. The secret process may be the subject of confidential communication and of sale or license to use with restrictions as to territory and prices. *Fowle v. Park*, 131 U. S. 88, 33 L. ed. 67. A similar principle obtains with respect to the confidential communication of quotations collected by a board of trade. *Board of Trade v. Christie Grain & Stock Co.* 198 U. S. 236, 49 L. ed. 1031.

Here, however, the question concerns not the process of manufacture, but the manufactured product,—an article of commerce. The complainant has not communicated its process in trust, or under contract, or executed a license for the use of the process with restrictions as to the manufacturer and sale by the licensee to whom the communication is made. The complainant has retained its secret, which apparently it believes to be undiscoverable. Whether its remedies are sold or unsold, whether the restrictions as to future sales are valid or invalid, the complainant's secret remains intact. That the complainant may rightfully object to attempts to discover it by fraudulent means, or to a breach of trust or contract relating to the process, does not require the conclusion that it is entitled to establish restrictions with respect to future sales by those who purchase its manufactured product. It is said that the remedies "embody" the secret. It would be more correct to say that they are manufactured according to the secret process, and do not constitute a communication of it. It is also urged that, as the process is secret, no one else can manufacture the article. But this argument rests on monopoly of production, and not on the secrecy of the process or the

particular fact that may confer that monopoly. It implies that if, for any reason, monopoly of production exists, it carries with it the right to control the entire trade of the produced article, and to prevent any competition that otherwise might arise between wholesale and retail dealers. The principle would not be limited to secret processes, but would extend to goods manufactured by anyone who secured control of the source of supply of a necessary raw material or ingredient. But, because there is monopoly of production, it certainly cannot be said that there is no public interest in maintaining freedom of trade with respect to future sales after the article has been placed on the market and the producer has parted with his title. Moreover, every manufacturer, before sale, controls the articles he makes. With respect to these, he has the rights of ownership, and his dominion does not depend upon whether the process of manufacture is known or unknown, or upon any special advantage he may possess by reason of location, materials, or efficiency. The fact that the market may not be supplied with the particular article unless he produces it is a practical consequence which does not enlarge his right of property in what he does produce.

If a manufacturer, in the absence of statutory privilege, has the control over the sales of the manufactured article which the complainant here contends, it is not because the process of manufacture is kept secret. In this respect, the maker of so-called proprietary medicines, unpatented, stands on no different footing from that of other manufacturers. The fact that the article is represented to be curative in its properties does not justify a restriction of trade which would be unlawful as to compositions designed for other purposes.

Second. We come, then, to the second question,—whether the complainant, irrespective of the secrecy of its process, is entitled to maintain the restrictions by virtue of the fact that they relate to products of its own manufacture.

The basis of the argument appears to be that, as the manufacturer may make and sell, or not, as he chooses, he may affix conditions as to the use of the article or as to the prices at which purchasers may dispose of it. The propriety of the restraint is sought to be derived from the liberty of the producer.

But because a manufacturer is not bound to make or sell, it does not follow in case of sales actually made he may impose upon purchasers every sort of restriction. Thus, a general restraint upon alienation is ordinarily invalid. "The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand. General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved, such as a slave or an heirloom, have been generally held void. 'If a man,' says Lord COKE, in 2 Coke on Littleton, § 360, 'be possessed . . . of a horse or of any other chattel, real or personal, and give or sell his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because the whole interest and property is out of him, so as he hath no possibility of a reverter; and it is against trade and traffic and bargaining and contracting between man and man.' " *John D. Park & Sons Co. v. Hartman*, 12 L. R. A. (N. S.) 146, 82 C. C. A. 158. See also *Gray, Restraints on Alienation of Property*, §§ 27, 28.

Nor can the manufacturer by rule and notice, in the absence of contract or statutory right, even though the restriction be known to purchasers, fix prices for future sales. It has been held by this court that no such privilege exists under the copyright statutes, although the owner of the copyright has the sole right to vend copies of the copyrighted production. *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 52 L. ed. 1086. There the court said (p. 351): "The owner of the copyright in this case did sell copies of the book in quantities and at a price satisfactory to it. It has exercised the right to vend. What the complainant contends for embraces not only the right to sell the copies, but to qualify the title of a future purchaser by the reservation of the right to have the remedies of the statute against an infringer because of the printed notice of its purpose so to do unless the purchaser sells at a price fixed in the notice. To add to the right of exclusive sale the authority to control all future retail sales, by a notice that such sales must be made at a fixed sum, would give a

right not included in the terms of the statute, and, in our view, extend its operation, by construction, beyond its meaning, when interpreted with a view to ascertaining the legislative intent in its enactment." It will hardly be contended, with respect to such a matter, that the manufacturer of an article of commerce not protected by any statutory grant is in any better case. See *Taddy & Co. v. Sterious & Co.*, [1904] 1 Ch. 354; *McGruther v. Pitcher*, [1904] 2 Ch. 306; *Garst v. Hall & L. Co.*, 179 Mass. 588, 55 L. R. A. 631. Whatever right the manufacturer may have to project his control beyond his own sales must depend not upon an inherent power incident to production and original ownership, but upon agreement.

With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified in adaptation to modern conditions. But the public interest is still the first consideration. To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties, and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenantee. Otherwise restraints of trade are void as against public policy. As was said by this court in *Gibbs v. Consolidated Gas Co.*, 130 U. S. 409, 32 L. ed. 984: "The decision in *Mitchel v. Reynolds*, 1 P. Wms. 181, s. c. 1 Smith, Lead. Cas. 7th Eng. ed. 407; 8th Am. ed. 756, is the foundation of the rule in relation to the invalidity of contracts in restraint of trade, but as it was made under a condition of things and a state of society different from those which now prevail, the rule laid down is not regarded as inflexible, and has been considerably modified. Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. The question is whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is, or is not, unreasonable. *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351; *Leather Cloth Co. v. Lorisont*, L. R. 9 Eq. 345."

"The true view at the present time," said Lord MACNAGHTEN in *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, [1894] A. C. p. 565, 6 Eng. Rul. Cas. 413, "I think, is this: The public have an interest in every person's carrying on his

trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable,—reasonable, that is, in reference to the interests of the parties concerned, and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favor it is imposed, while at the same time it is in no way injurious to the public.”

The present case is not analogous to that of a sale of good will, or of an interest in a business, or of the grant of a right to use a process of manufacture. The complainant has not parted with any interest in its business or instrumentalities of production. It has conferred no right by virtue of which purchasers of its products may compete with it. It retains complete control over the business in which it is engaged, manufacturing what it pleases and fixing such prices for its own sales as it may desire. Nor are we dealing with a single transaction, conceivably unrelated to the public interest. The agreements are designed to maintain prices after the complainant has parted with the title to the articles, and to prevent competition among those who trade in them.

The bill asserts the importance of a standard retail price, and alleges generally that confusion and damage have resulted from sales at less than the prices fixed. But the advantage of established retail prices primarily concerns the dealers. The enlarged profits which would result from adherence to the established rates would go to them, and not to the complainant. It is through the inability of the favored dealers to realize these profits, on account of the described competition, that the complainant works out its alleged injury. If there be an advantage to the manufacturer in the maintenance of fixed retail prices, the question remains whether it is one which he is entitled to secure by agreements restricting the freedom of trade on the part of dealers who own what they sell. As to this, the complainant can fare no better with its plan of

identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other. If the immediate advantage they would thus obtain would not be sufficient to sustain such a direct agreement, the asserted ulterior benefit to the complainant cannot be regarded as sufficient to support its system.

But agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void. They are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer. *People v. Sheldon*, 139 N. Y. 251, 23 L. R. A. 221, 36 Am. St. Rep. 690; *Judd v. Harrington*, 139 N. Y. 105; *People v. Milk Exch.* 145 N. Y. 267, 27 L. R. A. 437, 45 Am. St. Rep. 609; *United States v. Addystone Pipe & Steel Co.* 46 L. R. A. 122, 29 C. C. A. 141, 54 U. S. App. 723, on appeal 175 U. S. 211, 44 L. ed. 136; *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. ed. 608; *Chapin v. Brown Bros.* 83 Iowa, 156, 12 L. R. A. 428, 32 Am. St. Rep. 297; *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *W. H. Hill Co. v. Gray & Worcester*, —Mich.—, 30 L. R. A. (N. S.) 327.

The complainant's plan falls within the principle which condemns contracts of this class. It, in effect, creates a combination for the prohibited purposes. No distinction can properly be made by reason of the particular character of the commodity in question. It is not entitled to special privilege or immunity. It is an article of commerce, and the rules concerning the freedom of trade must be held to apply to it. Nor does the fact that the margin of freedom is reduced by the control of production make the protection of what remains, in such a case a negligible matter. And where commodities have passed into the channels of trade and are owned by dealers, the validity of agreements to prevent competition and to maintain prices is not to be determined by the circumstance whether they were produced by several manufacturers or by one, or whether they were previously owned by one or by many. The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic.

The questions involved were carefully considered and the decisions reviewed by Judge LURTON in delivering the opinion of the circuit court of appeals in *John D. Park & Sons Co. v. Hartman*, supra, and, in following that case, it was concluded below that the restrictions sought to be enforced by the bill were invalid both at common law and under the act of Congress of July 2, 1890. We think that the court was right.

The allegations of the bill as to the labels and cartons used by the complainant are evidently incidental to the main charge as to the procurement of violation of the restrictions as to prices and vendees contained in the agreement; and failing as to this, no case is made for relief with respect to the trade-marks, which are not shown to have been infringed.

Judgment affirmed.

Mr. Justice LURTON took no part in the consideration and decision of this case.

MR. JUSTICE HOLMES, dissenting:

This is a bill to restrain the defendant from inducing, by corruption and fraud, agents of the plaintiff and purchasers from it to break their contracts not to sell its goods below a certain price. There are two contracts concerned. The first is that of the jobber or wholesale agent to whom the plaintiff consigns its goods; and I will say a few words about that, although it is not this branch of the case that induces me to speak. That they are agents, and not buyers, I understand to be conceded, and I do not see how it can be denied. We have nothing before us but the form and the alleged effect of the written instrument, and they both are express that the title to the goods is to remain in the plaintiff until actual sale as permitted by the contract. So far as this contract limits the authority of the agents as agents, I do not understand its validity to be disputed. But it is construed also to permit the purchase of medicine by consignees from other consignees, and to make the specification of prices applicable to goods so purchased as well as to goods consigned. Hence, when the bill alleges that the defendant has obtained medicine from these agents by inducing them to break their contracts, the allegation does not require proof of breach of trust by an agent, but would be satisfied by proving a breach of promise

in respect of goods that the consignee had bought and owned. This reasoning would have been conclusive in the days of *Saunders* if the construction of the contract is right, as I suppose that it is. But the contract as to goods purchased is at least in the background and obscure; it is not the main undertaking that the instrument is intended to express. I should have thought that the bill ought to be read as charging the defendant with inducing a breach of the ordinary duty of consignees as such (*Swift & Co. v. United States*, 196 U. S. 375, 395, 49 L. ed. 518, 523, and therefore as entitling the plaintiff to relief (*Angle v. Chicago, St. P. M. & O. R. Co.*, 151 U. S. 1, 38 L. ed. 55)).

The second contract is that of the retail agents, so called, being really the first purchasers, fixing the price below which they will not sell to the public. There is no attempt to attach a contract or condition to the goods, as in *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 52 L. ed. 1086, or in any way to restrict dealings with them after they leave the hands of the retail men. The sale to the retailers is made by the plaintiff, and the only question is whether the law forbids a purchaser to contract with his vendor that he will not sell below a certain price. This is the important question in this case. I suppose that in the case of a single object, such as a painting or a statue, the right of the artist to make such a stipulation hardly would be denied. In other words, I suppose that the reason why the contract is held bad is that it is part of a scheme embracing other similar contracts, each of which applies to a number of similar things, with the object of fixing a general market price. This reason seems to me inadequate in the case before the court. In the first place, by a slight change in the form of the contract the plaintiff can accomplish the result in a way that would be beyond successful attack, if it should make the retail dealers also agents in law as well as in name, and retain the title until the goods left their hands, I cannot conceive that even the present enthusiasm for regulating the prices to be charged by other people would deny that the owner was acting within his rights. It seems to me that this consideration by itself ought to give us pause.

But I go farther. There is no statute covering the case; there is no body of precedent that, by ineluctable logic, requires the conclusion to which the court has come. The con-

clusion is reached by extending a certain conception of public policy to a new sphere. On such matters we are in perilous country. I think that at least it is safe to say that the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear. What, then, is the ground upon which we interfere in the present case? Of course, it is not the interest of the producer. No one, I judge, cares for that. It hardly can be the interest of subordinate vendors, as there seems to be no particular reason for preferring them to the originator and first vendor of the product. Perhaps it may be assumed to be the interest of the consumers and the public. On that point I confess that I am in a minority as to larger issues than are concerned here. I think that we greatly exaggerate the value and importance to the public of competition in the production or distribution of an article (here it is only distribution) as fixing a fair price. What really fixes that is the competition of conflicting desires. We, none of us, can have as much as we want of all the things that we want. Therefore, we have to choose. As soon as the price of something that we want goes above the point at which we are willing to give up other things to have that, we cease to buy it and buy something else. Of course, I am speaking of things that we can get along without. There may be necessities that sooner or later must be dealt with like short rations in a shipwreck, but they are not Dr. Miles's medicines. With regard to things like the latter, it seems to me that the point of most profitable returns marks the equilibrium of social desires, and determines the fair price in the only sense in which I can find meaning in those words. The Dr. Miles Medical Company knows better than we do what will enable it to do the best business. We must assume its retail price to be reasonable, for it is so alleged and the case is here on demurrer; so I see nothing to warrant my assuming that the public will not be served best by the company being allowed to carry out its plan. I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own, and thus to impair, if not to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get.

The conduct of the defendant falls within a general prohibition of the law. It is fraudulent, and has no merits of its own to recommend it to the favor of the court. An injunction against a defendant's dealing in nontransferable round-trip reduced-rate tickets has been granted to a railroad company upon the general principles of the law protecting contracts, and the demoralization of rates has been referred as a special circumstance in addition to the general grounds. *Bitterman v. Louisville & N. R. Co.* 207 U. S. 205, 222-224, 52 L. ed. 171, 182, 183, 12 A. & E. Ann. Cas. 693. The general and special considerations equally apply here, and we ought not to disregard them, unless the evil effect of the contract is very plain. The analogy relied upon to establish that evil effect is that of combinations in restraint of trade. I believe that we have some superstitions on that head, as I have said; but those combinations are entered into with intent to exclude others from a business naturally open to them, and we unhappily have become familiar with the methods by which they are carried out. I venture to say that there is no likeness between them and this case (*Jayne v. Loder*, 7 L. R. A. (N. S.) 984, 78 C. C. A. 653, 9 A. & E. Ann. Cas. 294), and I think that my view prevails in England (*Elliman, Sons & Co. v. Carrington & Son* [1901] 2 Ch. 275). See *Garst v. Harris*, 177 Mass. 72, *Garst v. Charles*, 187 Mass. 144. I think also that the importance of the question and the popularity of what I deem mistaken notions makes it my duty to express my view in this dissent.

SECTION 5

COMBINATIONS

(a.) Of Transportation Units

UNITED STATES v. TRANS-MISSOURI FREIGHT ASSOCIATION

(Supreme Court of United States, 1897. 166 U. S. 290.)

On the 2d of July, 1890, an act was passed by the congress of the United States, entitled "An act to protect trade and

commerce against unlawful restraints and monopolies." 26 Stat. 209, c. 647; Supp. Rev. St. p. 762.

On the 15th day of March, 1889, all but three of the defendants, the railway companies named in the bill, made and entered into an agreement by which they formed themselves into an association to be known as the "Trans-Missouri Freight Association," and they agreed to be governed by the provisions contained in the articles of agreement.

The memorandum of agreement entered into between the railway companies named therein stated, among other things, as follows:

"For the purpose of mutual protection by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local, the subscribers do hereby form an association to be known as the 'Trans-Missouri Freight Association,' and agree to be governed by the following provisions:

"Article I.

"The traffic to be included in the Trans-Missouri Freight Association shall be as follows:

"(1) All traffic competitive between any two or more members hereof, passing between points in the following described territory: Commencing at the Gulf of Mexico, on the 95th meridian; thence north, to the Red river; thence, via that river, to the eastern boundary line of the Indian Territory; thence north, by said boundary line and the eastern line of the state of Kansas, to the Missouri river, at Kansas City; thence, via the said Missouri river, to the point of intersection of that river with the eastern boundary of Montana; thence, via the said eastern boundary line, to the international line,—the foregoing to be known as the 'Missouri River Line'; thence, via said international line, to the Pacific coast; thence, via the Pacific coast, to the international line between the United States and Mexico; thence, via said international line, to the Gulf of Mexico; and thence, via said gulf, to the point of beginning,—including business between points on the boundary line as described.

"(2) All freight traffic originating within the territory as

defined in the first section when destined to points east of the aforesaid Missouri River Line."

Certain exceptions to the above article are then stated as to the particular business of several railway companies, which was to be regarded as outside and beyond the provisions of the agreement.

Article 2 provided for the election of a chairman of the organization, and for meetings at Kansas City, or otherwise, as might be provided for. By section 2 of that article, each road was to "designate to the chairman one person who shall be held personally responsible for rates on that road. Such person shall be present at all regular meetings, when possible, and shall represent his road, unless a superior officer is present. If unable to attend, he shall send a substitute, with written authority to act upon all questions which may arise, and the vote of such substitute shall be binding upon the company he represents."

Section 3 provides that "a committee shall be appointed to establish rates, rules, and regulations on the traffic subject to this association, and to consider changes therein, and make rules for meeting the competition of outside lines. Their conclusions, when unanimous, shall be made effective when they so order; but, if they differ, the question at issue shall be referred to the managers of the lines parties hereto; and, if they disagree, it shall be arbitrated in the manner provided in article 7."

By section 4 it was provided that "at least five days' written notice prior to each monthly meeting shall be given the chairman of any proposed reduction in rates or change in any rule or regulation governing freight traffic; eight days in so far as applicable to the traffic of Colorado or Utah."

Sections 5, 6, 7, 8, 9, 10, and 11 of article 2 read as follows:

"Sec. 5. At each monthly meeting, the association shall consider and vote upon all changes proposed, of which due notice has been given, and all parties shall be bound by the decision of the association, as expressed, unless then and there the parties shall give the association definite written notice that in ten days thereafter they shall make such modification, notwithstanding the vote of the association: provided, that, if the member giving notice of change shall fail to be represented

at the meeting, no action shall be taken on its notice, and the same shall be considered withdrawn. Should any member insist upon a reduction of rate against the views of the majority, or if the majority favor the same, and if, in the judgment of such majority, the rate so made affects seriously the rates upon other traffic, then the association may, by a majority vote, upon such other traffic put into effect corresponding rates to take effect on the same day. By unanimous consent, any rate, rule, or regulation relating to freight traffic may be modified at any meeting of the association without previous notice.

“Sec. 6. Notwithstanding anything in this article contained, each member may, at its peril, make at any time, without previous notice, such rate, rule, or regulations as may be necessary to meet the competition of lines not members of the association, giving at the same time notice to the chairman of its action in the premises. If the chairman, upon investigation, shall decide that such rate is not necessary to meet the direct competition of lines not members of the association, and shall so notify the road making the rate, it shall immediately withdraw such rate. At the next meeting of the association held after the making of such rate, it shall be reported to the association, and, if the association shall decide by a two-thirds vote that such rate was not made in good faith to meet such competition, the member offending shall be subject to the penalty provided in section 8 of this article. If the association shall decide by a two-thirds vote that such rate was made in good faith to meet such competition, it shall be considered as authority for the rate so made.

“Sec. 7. All arrangements with connecting lines for the division of through rates relating to traffic covered by this agreement shall be made by authority of the association: provided, however, that, when one road has a proprietary interest in another, the divisions between such roads shall be what they may elect, and shall not be the property of the association: provided, further, that, as regards traffic contracts at this date actually existing between lines not having common proprietary interests, the same shall be reported, so far as divisions are concerned, to the association, to the end that divisions with competing lines may, if thought advisable by them, be made on equally favorable terms.

"Sec. 8. It shall be the duty of the chairman to investigate all apparent violations of the agreement, and to report his findings to the managers, who shall determine, by a majority vote (the member against whom complaint is made to have no vote), what, if any, penalty shall be assessed, the amount of each fine not to exceed one hundred dollars, to be paid to the association. If any line party hereto agrees with a shipper, or any one else, to secure a reduction or change in rates, or change in the rules and regulations, and it is shown upon investigation by the chairman that such an arrangement was effected, and traffic thereby secured, such action shall be reported to the managers, who shall determine, as above provided, what, if any, penalty shall be assessed.

"Sec. 9. When a penalty shall have been declared against any member of this association, the chairman shall notify the managing officer of said company that such fine has been assessed, and that within ten days thereafter he will draw for the amount of the fine; and the draft, when presented, shall be honored by the company thus assessed.

"Sec. 10. All fines collected to be used to defray the expenses of the association, the offending party not to be benefited by the amounts it may pay as fines.

"Sec. 11. Any member not present or fully represented at roll call of general or special meetings of the freight association, of which due and proper notice has been given, shall be fined one dollar, to be assessed against his company, unless he shall have previously filed with the chairman notice of inability to be present or represented."

Articles 3, 5, 6, and 7 contain appropriate provisions for the carrying out of the purposes of the agreement, but it is not necessary to here set them forth in detail.

Article 4 reads as follows:

"Article 4.

"Any willful underbilling in weights, or billing of freight at wrong classification, shall be considered a violation of this agreement; and the rules and regulations of any weighing association or inspection bureau, as established by it or as enforced by its officers and agents, shall be considered binding under the provisions of this agreement, and any willful viola-

tion of them shall be subject to the penalties provided herein.”

Article 8 provides that the agreement should take effect April 1, 1889, subject thereafter to 30 days’ notice of a desire on the part of any line to withdraw from the same.

On the 6th of January, 1892, the United States, as complainant, filed in the circuit court of the United States for the district of Kansas, through its United States attorney for that district, and under the direction of the attorney general of the United States, its bill of complaint against the Trans-Missouri Freight Association, named in the agreement above mentioned, the Atchison, Topeka & Santa Fé Railroad Company, and some 17 other railroad companies, the officers of which had, it was alleged, signed the agreement above mentioned in behalf of and for their respective companies. The bill was filed by the government for the purpose of having the agreement between the defendant railroad companies set aside and declared illegal and void, and to have the association dissolved.

It alleged that the defendant railroad corporations, signing the agreement, were at that time, and ever since have been, common carriers of all classes and kinds of freight and commodities which were commonly moved, carried, and transported by railroad companies in their freight traffic, and at all such times have been, and then were, continuously engaged in transporting freight and commodities in the commerce, trade, and traffic which is continuously carried on among and between the several states of the United States, and among and between the several states and territories of the United States, and between the people residing in, and all persons engaged in trade and commerce within and among and between, the states, territories, and countries aforesaid; that each of the defendants was, prior to the 15th day of March, 1889, the owner and in the control of, and that they were respectively operating and using, distinct and separate lines of railroad, fitted up for carrying on business as such carriers in the freight traffic above mentioned, independently and disconnectedly with each other, and that said lines of railroad had been, and then were, the only lines of transportation and communication engaged in the freight traffic between and among the states and territories of the United States having

through lines for said freight traffic in all that region of country lying to the westward of the Mississippi and Missouri rivers, and east of the Pacific Ocean; that these lines of railroad furnish to the public, and to persons engaged in trade and traffic and commerce between the several states and territories and countries above mentioned, separate, distinct, and competitive lines of transportation and communication extending along and between the states and territories of the United States lying westward of the Mississippi and Missouri rivers to the Pacific Ocean; and that the construction and maintenance of said several separate, distinct, and competitive lines of railroad aforesaid had been encouraged and assisted by the United States and by the states and territories in the region of country aforesaid, and by the people of the said several states and territories, by franchises and by grants and donations of large amounts of land of great value, and of money and securities, for the purpose of securing to the public, and to the people engaged in trade and commerce throughout the region of country aforesaid, competitive lines of transportation and communication; and that prior to the 15th day of March, 1889, and subsequently and up to the present time, each and all of said defendants have been and are engaged as common carriers in the railway freight traffic connected with the interstate commerce of the United States.

It is then alleged in the bill as follows:

“And your orator further avers that on or about the fifteenth day of March, 1889, the defendants not being content with the usual rates and prices for which they and others were accustomed to move, carry, and transport property, freight, and commodities in the trade and commerce aforesaid, and in their said business and occupation, but contriving and intending unjustly and oppressively to increase and augment the said rates and prices, and to counteract the effect of free competition on the facilities and prices of transportation, and to establish and maintain arbitrary rates, and to prevent any one of said defendants from reducing such arbitrary rates, and thereby exact and procure great sums of money from the people of the said states and territories aforesaid, and from the people engaged in the interstate commerce, trade, and traffic within the region of country aforesaid, and from all

persons having goods, wares, and merchandise to be transported by said railroads, and intending to monopolize the trade, traffic, and commerce among and between the states and territories aforesaid, did combine, conspire, confederate, and unlawfully agree together, and did then and there enter into a written contract, combination, agreement, and compact, known as a 'Memorandum of Agreement of the Trans-Missouri Freight Association,' which was signed by each of said above-named defendants."

The bill then sets forth the agreement signed by the various corporations defendant.

It is further alleged that the agreement went into effect on the 1st day of April, 1889, and that since that time each and all of the defendants, by reason of the agreement, have put into effect and kept in force upon the several lines of railroads the rules and regulations and rates and prices for moving, carrying, and transporting freight fixed and established by the association, and have declined and refused to fix or establish and maintain or give on their railroads rates and prices for the carrying of freight based upon the cost of constructing and maintaining their several lines of railroad and the cost of carrying freights over the same, and such other elements as should be considered in establishing tariff rates upon each particular road; and the people of the states and territories subject to said association, and all persons engaged in trade and commerce within, among, and between the different states and territories, have been compelled to, and are still compelled to, pay the arbitrary rates of freight, and submit to the arbitrary rules and regulations, established and maintained by the association, and ever since that date have been, and still are, deprived of the benefits that might be expected to flow from free competition between said several lines of transportation and communication, and are deprived of the better facilities and cheaper rates of freight that might be reasonably expected to flow from free competition between the lines above mentioned; and that the trade, traffic, and commerce in such region of country, and the freight traffic in connection therewith, have been and are monopolized and restrained, hindered, injured, and retarded by the defendants by means and through the instrumentality of such association.

The bill further averred that notwithstanding the passage of the act of congress above mentioned, on the 2d day of July, 1890, the "defendants still continue in and still engage in said unlawful combination and conspiracy, and still maintain said Trans-Missouri Freight Association, with all the powers specified in the memorandum of agreement and articles of association hereinbefore set forth, which said agreement, combination, and conspiracy so as aforesaid entered into and maintained by said defendants is of great injury and grievous prejudice to the common and public good, and to the welfare of the people of the United States."

The prayer of the bill is as follows:

"In consideration whereof, and inasmuch as your orator can only have adequate relief in the premises in this honorable court where matters of this nature are properly cognizable and relievable, your orator prays that this honorable court may order, adjudge, and decree that said Trans-Missouri Freight Association be dissolved; and that said defendants, and all and each of them, be enjoined and prohibited from further agreeing, combining, and conspiring and acting together to maintain rules and regulations and rates for carrying freight upon their several lines of railroad to hinder trade and commerce between the states and territories of the United States; and that all and each of them be enjoined and prohibited from entering or continuing in a combination, association, or conspiracy to deprive the people engaged in trade and commerce between and among the states and territories of the United States of such facilities and rates and charges of freight transportation as will be afforded by free and unrestrained competition between the said several lines of railroad; and that all and each of said defendants be enjoined and prohibited from agreeing, combining, and conspiring and acting together to monopolize, or attempt to monopolize, the freight traffic in the trade and commerce between the states and territories of the United States; and that all and each of said defendants be enjoined and prohibited from agreeing, combining, and conspiring and acting together to prevent each and any of their associates from carrying freight and commodities in the trade and commerce between the states and territories of the United States at such rates as shall be volun-

tarily fixed by the officers and agents of each of said roads acting independently and separately in its own behalf."

The defendants were required to answer fully, etc., each and all of the matters charged in the bill, but such answer was not required to be under oath, an answer under oath being specially waived.

The Chicago, Kansas & Nebraska Railway Company, the Missouri, Kansas & Texas Railway Company, and the Denver, Texas & Ft. Worth Railroad Company denied being parties to the association. The other 15 companies filed separate answers, each setting up substantially the same defense.

They admit they are common carriers engaged in the transportation of persons and property in the states and territories mentioned in the agreement, and they allege that as such common carriers they are subject to the provisions of the act of congress approved February 4, 1887, entitled "An act to regulate commerce," with the various amendments thereof and additions thereto, and they allege that that act and the amendments constitute a system of regulations established by congress for common carriers subject to the act, and they deny that they are subject to the provisions of the act of congress passed July 2, 1890, and above set forth.

They admit that they severally own, control, and operate separate and distinct lines of railroad constructed and fitted for carrying on business as common carriers of freight, independently and disconnectedly with each other, except that a common interest exists between certain companies, named in the answer. They admit that the lines of railroad mentioned in the bill furnish lines of transportation and communication to persons engaged in freight traffic between and among the states and territories of the United States, having through lines for freight traffic in that region of country lying to the westward of the Mississippi and Missouri rivers and east of the Pacific Ocean, but deny that they are the only such lines, and allege that there are several others, naming them.

They further admit that prior to the organization of the freight association the defendants furnished to the public, and to persons engaged in trade, traffic, and commerce between the several states and territories named in the agreement, separate, distinct, and competitive lines of transportation

and communication, and they allege that they still continue to do so.

They admit that some of the roads mentioned in the bill received aid by land grants from the United States, and others received aid from states and territories by loans of credits, donations of depot sites and rights of way, and in a few cases by investments of money, and that the people of the states and territories to a limited extent made investments in the stocks and bonds of some of the roads, while others, mentioned in the bill, were almost exclusively constructed by capital furnished by nonresidents of that region.

It is also admitted that the purpose of the land grants, loans, donations, and investments was to obtain the construction of competitive lines of transportation and communication, to the end that the public and the people engaged in trade and commerce throughout that region of country might have facilities afforded by railways in communicating with each other and with other portions of the United States and the world, and denies that they were granted for any other purpose.

The defendants admit the formation on or about March 15, 1889, of the voluntary association described in the bill as the "Trans-Missouri Freight Association."

They deny the allegation that they were not content with the rates and prices prevailing at the date of the agreement; they deny any intent to unjustly increase rates, and deny that the agreement destroyed, prevented, or illegally limited or influenced competition; they deny that arbitrary rates were fixed or charged, or that rates have been increased, or that the effect of free competition has been counteracted; they deny any purpose in the formation of the association to monopolize trade, traffic, and commerce between the states and territories within the region mentioned in the bill; and they deny that the agreement is in any respect the illegal result of any unlawful confederation or conspiracy. The defendants allege that the power object of the association is to establish reasonable rates, rules, and regulations on all freight traffic, and the maintenance of such rates until changed in the manner provided by law; that the agreement was filed with the interstate commerce commission as required by section 6 of the act of February 4, 1887. They also allege that it was not

the purpose of the association to prevent the members from reducing rates or changing the rules and regulations fixed by the association; that by the terms of the agreement each member may do so, the preliminary requirement being that the proposed change shall be voted upon at a meeting of the association, after which, if the proposal is not agreed to, the line making the proposal can make such reduced rate notwithstanding the objection of the other lines; that the purpose of this provision was to afford opportunity for the consideration of the reasonableness of any proposed rate, rule, or regulation by all lines interested, and an interchange of views on the effect of such reduction, and that reductions of rates have been made in numerous instances through said process by the association. They admit the agreement took effect April 1, 1889, and that it has remained in operation since, and that the rates, rules, and regulations fixed and established from time to time under said agreement have been put into effect and maintained in conformity to law; and it is denied that by reason of the agreement, or under duress of fines and penalties, or otherwise, the defendants have refused to establish and maintain just and reasonable rates; and it is alleged that the object of the association at all times has been and is to establish all rates, rules, and regulations upon a just and reasonable basis, and to avoid unjust discrimination and undue preference. They deny that shippers or the public are in any way oppressed or injured by reason of the rates fixed by the association, but, on the contrary, they allege that the agreement and the association established under it have been beneficial to the patrons of the railway lines composing the association and the public at large. These, in substance, are the allegations in the various answers.

The cause came on for hearing on bill and answer before the circuit court of the United States for the district of Kansas, First division. That court dismissed the bill without costs against the complainant, 53 Fed. 440. The government duly appealed from the judgment to the United States circuit court of appeals for the Eighth circuit, and that court, after argument, affirmed, in October, 1893, the judgment of the circuit court, without costs, SHIRAS, district judge, dissenting. 19

U. S. App. 36, 7 C. C. A. 15. From that judgment the government has appealed to this court.

A motion is now made upon affidavits to dismiss the appeal. The affidavits show that on the 18th of November, 1892, a resolution was adopted by the Trans-Missouri Freight Association, one of the defendants, providing that the organization should be discontinued from and after the 19th of November, 1892, and the secretary was instructed to wind up its affairs at as early a date as possible. It further appeared by the affidavits that the Trans-Missouri Freight Association was actually dissolved and its existence ended on the above date, November 19, 1892, and that it has not since that date been revived, nor has it since that date had any activity of any kind, "and that it has not conducted or been engaged in any operations or business whatever, but that it has been dead and out of existence."

It is also alleged as another ground for dismissing the appeal that the matter in controversy does not exceed \$1,000, and that the case does not come under any other provision of the act of 1891, allowing an appeal from the circuit courts of appeals to this court. In opposition to the motion it appeared upon the part of the appellant that at the same meeting at which the resolution above referred to was adopted the following resolution was also adopted: "Resolved, that a committee of 7 be appointed by the chairman of this meeting to draw up a new agreement for the conduct of business now substantially covered by the Trans-Missouri agreement, and to make a report to all lines in the Trans-Missouri Association at a meeting to be called in Chicago on December 6, 1892." A committee of seven was accordingly appointed, which adopted a resolution calling a meeting for the 6th of December, 1892, of the lines formerly members of the Trans-Missouri Association, and representatives of other interested lines, for the purpose of considering any changes in the tariffs and of business which was under the jurisdiction of that association, and which might be submitted to the parties at that time, and to further consider the organization of one or more rate committees to govern the manner of making rates on such traffic until some permanent organization could be effected. In the early days of December, 1892, the meeting so called

was held, and was participated in by most of the railroad companies which were parties to the Trans-Missouri agreement, and at that meeting an agreement was made upon the subject of rates of freight, and a West Missouri freight rate committee was appointed, the duties of which committee were to establish and maintain reasonable rates in the territory described, and other lines not therein represented, but interested in the freight traffic of such territory, were to be invited to become members. A plan for the establishment of subrate committees for the purpose of agreeing upon rates was therein set forth and agreed to. The agreement was to become effective on the 1st of January, 1892, and to remain in force until the following April, during which time it was supposed that a new and permanent association to provide for an agreement relating to rates of freight might be founded. It does not appear whether such permanent association has been formed or that the temporary agreement has been actually terminated.

In answer to the motion to dismiss on the ground that the matter in controversy did not amount to over a thousand dollars, the parties have stipulated as follows: "It is hereby stipulated for the purposes of this case, and no other, and without waiving any right to question the legal effect of such fact, that the daily freight charges on interstate shipments collected by all the railway companies at points where they compete with each other were, at the time of the agreement mentioned in the pleadings herein, and have been since, more than one thousand dollars."

MR. JUSTICE PECKHAM, after stating the facts in the foregoing language, delivered the opinion of the court.¹¹ * * *

Second. The next question to be discussed is as to what is the true construction of the statute, assuming that it applies to common carriers by railroad. What is the meaning of the language, as used in the statute, that "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or

11—Part of opinion relating to the jurisdiction of the court and whether the Sherman Anti-Trust

Act applies to and covers common carriers of railroads omitted.

with foreign nations, is hereby declared to be illegal"? Is it confined to a contract or combination which is only in unreasonable restraint of trade or commerce, or does it include—what the language of the act plainly and in terms covers—all contracts of that nature?

We are asked to regard the title of this act as indicative of its purpose to include only those contracts which were unlawful at common law, but which require the sanction of a federal statute in order to be dealt with in a federal court. It is said that when terms which are known to the common law are used in a federal statute, those terms are to be given the same meaning that they received at common law; and that, when the language of the title is "to protect trade and commerce against unlawful restraints and monopolies," it means those restraints and monopolies which the common law regarded as unlawful, and which were to be prohibited by the federal statute. We are of opinion that the language used in the title refers to and includes, and was intended to include, those restraints and monopolies which are made unlawful in the body of the statute. It is to the statute itself that resort must be had to learn the meaning thereof, though a resort to the title here creates no doubt about the meaning of, and does not alter the plain language contained in, its text.

It is now with much amplification of argument urged that the statute, in declaring illegal every combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, does not mean what the language used therein plainly imports, but that it only means to declare illegal any such contract which is in unreasonable restraint of trade, while leaving all others unaffected by the provisions of the act; that the common-law meaning of the term "contract in restraint of trade" includes only such contracts as are in unreasonable restraint of trade; and when that term is used in the federal statute it is not intended to include all contracts in restraint of trade, but only those which are in unreasonable restraint thereof.

The term is not of such limited signification. Contracts in restraint of trade have been known and spoken of for hundreds of years, both in England and in this country, and the term includes all kinds of those contracts which in fact restrain or

may restrain trade. Some of such contracts have been held void and unenforceable in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. A contract may be in restraint of trade, and still be valid at common law. Although valid, it is nevertheless a contract in restraint of trade, and would be so described either at common law or elsewhere. By the simple use of the term "contract in restraint of trade," all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by congress.

Proceeding, however, upon the theory that the statute did not mean what its plain language imported, and that it intended in its prohibition to denounce as illegal only those contracts which were in unreasonable restraint of trade, the courts below have made an exhaustive investigation as to the general rules which guide courts in declaring contracts to be void as being in restraint of trade, and therefore against the public policy of the country. In the course of their discussion of that subject they have shown that there has been a gradual, though great, alteration in the extent of the liberty granted to the vendor of property in agreeing, as part consideration for his sale, not to enter into the same kind of business for a certain time or within a certain territory. So long as the sale was the bona fide consideration for the promise, and was not made a mere excuse for an evasion of the rule itself, the later authorities, both in England and in this country, exhibit a strong tendency towards enabling the parties to make such a contract in relation to the sale of property, including an agreement not to enter into the same kind of business, as they may think proper, and this with the view to granting to a vendor the freest opportunity to obtain the largest considera-

tion for the sale of that which is his own. A contract which is the mere accompaniment of the sale of property, and thus entered into for the purpose of enhancing the price at which the vendor sells it, which, in effect, is collateral to such sale; and where the main purpose of the whole contract is accomplished by such sale, might not be included within the letter or spirit of the statute in question. But we cannot see how the statute can be limited, as it has been by the courts below, without reading into its text an exception which alters the natural meaning of the language used, and that, too, upon a most material point, and where no sufficient reason is shown for believing that such alteration would make the statute more in accord with the intent of the lawmaking body that enacted it.

The great stress of the argument for the defendants on this branch of the case has been to show, if possible, some reason in the attendant circumstances, or some fact existing in the nature of railroad property and business, upon which to found the claim that, although by the language of the statute agreements or combinations in restraint of trade or commerce are included, the statute really means to declare illegal only those contracts, etc., which are in unreasonable restraint of trade. In order to do this, the defendants call attention to many facts which they have already referred to in their argument, upon the point that railroads were not included at all in the statute. They again draw attention to the fact of the peculiar nature of railroad property. When a railroad is once built, it is said, it must be kept in operation. It must transport property, when necessary in order to keep its business, at the smallest price, and for the narrowest profit, or even for no profit, provided running expenses can be paid, rather than not to do the work; that railroad property cannot be altered for use for any other purpose, at least without such loss as may fairly be called destructive; that competition, while perhaps right and proper in other business, simply leads in railroad business to financial ruin and insolvency, and to the operation of the road by receivers in the interest of its creditors, instead of in that of its owners and the public; that a contest between a receiver of an insolvent corporation and one which is still solvent tends to ruin the latter company, while being of no

benefit to the former; that a receiver is only bound to pay operating expenses so he can compete with the solvent company, and oblige it to come down to prices incompatible with any profit for the work done, and until ruin overtakes it, to the destruction of innocent stockholders, and the impairment of the public interests.

To the question why competition should necessarily be conducted to such an extent as to result in this relentless and continued war, to eventuate only in the financial ruin of one or all of the companies indulging in it, the answer is made that, if competing railroad companies be left subject to the sway of free and unrestricted competition, the results above foreshadowed necessarily happen from the nature of the case; that, competition being the rule, each company will seek business to the extent of its power, and will underbid its rival, in order to get the business, and such underbidding will act and react upon each company until the prices are so reduced as to make it impossible to prosper or live under them; that it is too much to ask of human nature for one company to insist upon charges sufficiently high to afford a reasonable compensation, and, while doing so, to see its patrons leave for rival roads, who are obtaining its business by offering less rates for doing it than can be afforded, and a fair profit obtained therefrom. Sooner than experience ruin from mere inanition, efforts will be made in the direction of meeting the underbidding of its rival, until both shall end in ruin. The only refuge, it is said, from this wretched end lies in the power of competing roads agreeing among themselves to keep up prices for transportation to such sums as shall be reasonable in themselves, so that companies may be allowed to save themselves from themselves, and to agree not to attack each other, but to keep up reasonable and living rates for the services performed. It is said that, as railroads have a right to charge reasonable rates, it must follow that a contract among themselves to keep up their charges to that extent is valid. Viewed in the light of all these facts, it is broadly and confidently asserted that it is impossible to believe that congress, or any other intelligent and honest legislative body, could ever have intended to include all contracts or combinations in restraint of trade, and, as a consequence thereof, to prohibit competing railways from

agreeing among themselves to keep up prices for transportation to such a rate as should be fair and reasonable.

These arguments, it must be confessed, bear with much force upon the policy of an act which should prevent a general agreement upon the question of rates among competing railroad companies to the extent simply of maintaining those rates which were reasonable and fair.

There is another side to this question, however, and it may not be amiss to refer to one or two facts which tend to somewhat modify and alter the light in which the subject should be regarded. If only that kind of contract which is in unreasonable restraint of trade be within the meaning of the statute, and declared therein to be illegal, it is at once apparent that the subject of what is a reasonable rate is attended with great uncertainty. What is a proper standard by which to judge the fact of reasonable rates? Must the rate be so high as to enable the return for the whole business done to amount to a sum sufficient to afford the shareholder a fair and reasonable profit upon his investment? If so, what is a fair and reasonable profit? That depends sometimes upon the risk incurred, and the rate itself differs in different localities. Which is the one to which reference is to be made as the standard? Or is the reasonableness of the profit to be limited to a fair return upon the capital that would have been sufficient to build and equip the road, if honestly expended? Or is still another standard to be created, and the reasonableness of the charges tried by the cost of the carriage of the article, and a reasonable profit allowed on that? And, in such case, would contribution to a sinking fund to make repairs upon the roadbed and renewal of cars, etc., be assumed as a proper item? Or is the reasonableness of the charge to be tested by reference to the charges for the transportation of the same kind of property made by other roads similarly situated? If the latter, a combination among such roads as to rates would, of course, furnish no means of answering the question. It is quite apparent, therefore, that it is exceedingly difficult to formulate even the terms of the rule itself which should govern in the matter of determining what would be reasonable rates for transportation; while, even after the standard should be determined, there is such an infinite variety of facts entering

into the question of what is a reasonable rate, no matter what standard is adopted, that any individual shipper would in most cases be apt to abandon the effort to show the unreasonable character of a charge, sooner than hazard the great expense in time and money necessary to prove the fact, and at the same time incur the ill will of the road itself in all his future dealings with it. To say, therefore, that the act excludes agreements which are not in unreasonable restraint of trade, and which tend simply to keep up reasonable rates for transportation, is substantially to leave the question of reasonableness to the companies themselves.

It must also be remembered that railways are public corporations organized for public purposes, granted valuable franchises and privileges, among which the right to take the private property of the citizen in invitum is not the least (*Cherokee Nation v. Southern Kan. Ry. Co.*, 135 U. S. 641, 657); that many of them are the donees of large tracts of public lands, and of gifts of money by municipal corporations, and that they all primarily owe duties to the public of a higher nature even than that of earning large dividends for their shareholders. The business which the railroads do is of a public nature, closely affecting almost all classes in the community,—the farmer, the artisan, the manufacturer, and the trader. It is of such a public nature that it may well be doubted, to say the least, whether any contract which imposes any restraint upon its business would not be prejudicial to the public interest.

We recognize the argument upon the part of the defendants that restraint upon the business of railroads will not be prejudicial to the public interest so long as such restraint provides for reasonable rates for transportation, and prevents the deadly competition so liable to result in the ruin of the roads, and to thereby impair their usefulness to the public, and in that way to prejudice the public interest. But it must be remembered that these results are by no means admitted with unanimity; on the contrary, they are earnestly and warmly denied on the part of the public and by those who assume to defend its interests both in and out of congress. Competition, they urge, is a necessity for the purpose of securing in the end just and proper rates.

It was said in *Gibbs v. Gas Co.*, 130 U. S. 396, at page 408, by Mr. Chief Justice FULLER, as follows: "The supply of illuminating gas is a business of a public nature to meet a public necessity. It is not a business like that of an ordinary corporation engaged in the manufacture of articles that may be furnished by individual effort. *New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Manufacturing Co.*, 115 U. S. 650; *Louisville Gas Co. v. Citizens' Gaslight Co.*, 115 U. S. 683; *Shepard v. Milwaukee Gas Co.*, 6 Wis. 539; *Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.*, 121 Ill. 530; *St. Louis v. St. Louis Gaslight Co.*, 70 Mo. 69. Hence, while it is justly urged that those rules which say that a given contract is against public policy should not be arbitrarily extended so as to interfere with the freedom of contract (*Registering Co. v. Samson*, L. R. 19 Eq. 462), yet, in the instance of business of such a character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy. This subject is much considered, and the authorities cited, in *West Virginia Transp. Co. v. Ohio River Pipe-Line Co.*, 22 W. Va. 600; *Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.*, 121 Ill. 530; *W. U. Tel. Co. v. American Union Tel. Co.*, 65 Ga. 160."

It is true, in the *Gibbs Case* there was a special statute, which prohibited the company from entering into any consolidation, combination, or contract with any other gas company whatever, and it was provided that any attempt to do so, or to make such combination or contract, should be utterly null and void. The above extract from the opinion of the court is made for the purpose of showing the difference which exists between a private and a public corporation; that kind of a public corporation which, while doing business for remuneration, is yet so connected in interest with the public as to give a public character to its business; and it is seen that while, in the absence of a statute prohibiting them, contracts of private individuals or corporations touching upon restraints in trade must be unreasonable in their nature to be held void, different considerations obtain in the case of public corporations like those of railroads, where it well may be that any

restraint upon a business of that character, as affecting its rates of transportation, must thereby be prejudicial to the public interests.

The plaintiffs are, however, under no obligation in order to maintain this action to show that by the common law all agreements among competing railroad companies to keep up rates to such as are reasonable were void as in restraint of trade or commerce. There are many cases which look in that direction, if they do not precisely decide that point. Some of them are referred to in the opinion in the Baltimore Gas Co. Case, above cited. The case of *Steamship Co. v. McGregor*, 21 Q. B. Div. 544, 23 Q. B. Div. 598, and [1892] App. Cas. 25, has been cited by the courts below as holding in principle that contracts of this nature are valid at common law. The agreement held valid there was an agreement for lowering rates of transportation among the parties thereto, and it was entered into for the purpose of driving out of trade rival steamships, in order that thereafter the rates might be advanced. The English courts held that the agreement was not a conspiracy, and that it was valid, although the result aimed at was to drive a rival out of the field, because, so long as the injury to such rival was not the sole reason for the agreement, but self-interest the predominating motive, there was nothing wrong in law with an agreement of that kind. But, assuming that agreements of this nature are not void at common law, and that the various cases cited by the learned courts below show it, the answer to the statement of their validity now is to be found in the terms of the statute under consideration. The provisions of the interstate commerce act relating to reasonable rates, discriminations, etc., do not authorize such an agreement as this, nor do they authorize any other agreements which would be inconsistent with the provisions of this act.

The general reasons for holding agreements of this nature to be invalid, even at common law, on the part of railroad companies, are quite strong, if not entirely conclusive.

Considering the public character of such corporations, the privileges and franchises which they have received from the public in order that they might transact business, and bearing in mind how closely and immediately the question of rates for transportation affects the whole public, it may be urged that

congress had in mind all the difficulties which we have before suggested of proving the unreasonableness of the rate, and might, in consideration of all the circumstances, have deliberately decided to prohibit all agreements and combinations in restraint of trade, or commerce, regardless of the question whether such agreements were reasonable or the reverse.

It is true that, as to a majority of those living along its line, each railroad is a monopoly. Upon the subject now under consideration, it is well said by Judge OLIVER P. SHIRAS, United States district judge, Northern district of Iowa, in his very able dissenting opinion in this case in the United States circuit court of appeals, as follows:

"As to the majority of the community living along its line, each railway company has a monopoly of the business demanding transportation as one of its elements. By reason of this fact, the action of this corporation in establishing the rates to be charged largely influences the net profit coming to the farmer, the manufacturer, and the merchant, from the sale of the products of the farm, the workshop and manufactory, and of the merchandise purchased and resold, and also largely influences the price to be paid by every one who consumes any of the property transported over the line of railway. There is no other line of business carried on in our midst which is so intimately connected with the public as that conducted by the railways of the country. * * * A railway corporation engaged in the transportation of the persons and property of the community is always carrying on a public business which at all times directly affects the public welfare. All contracts or combinations entered into between railway corporations intended to regulate the rates to be charged the public for the service rendered must, of necessity, affect the public interests. By reason of this marked distinction existing between enterprises inherently public in their character and those of a private nature, and, further, by reason of the difference between private persons and corporations engaged in private pursuits, who owe no direct or primary duty to the public and public corporations created for the express purpose of carrying on public enterprises, and which, in consideration of the public powers exercised in their behalf, are under obligation to carry on the work intrusted to their management primarily in the

interest and for the benefit of the community, it seems clear to me that the same test is not applicable to both classes of business and corporations in determining the validity of contracts and combinations entered into by those engaged therein.

* * * In the opinion of the court are found citations from the reports of the interstate commerce commission in which are depicted the evils that are occasioned to the railway companies and the public by warfares over rate charges, and the advantages that are gained in many directions by proper conference and concert of action among the competing lines. It may be entirely true that, as we proceed in the development of the policy of public control over railway traffic, methods will be devised and put in operation by legislative enactment whereby railway companies and the public may be protected against the evils arising from unrestricted competition, and from rate wars which unsettled the business of the community; but I fail to perceive the force of the argument that because railway companies, through their own action, cause evils to themselves and the public by sudden changes or reductions in tariff rates, they must be permitted to deprive the community of the benefit of competition in securing reasonable rates for the transportation of the products of the country. Competition, free and unrestricted, is the general rule which governs all the ordinary business pursuits and transactions of life. Evils, as well as benefits, result therefrom. In the fierce heat of competition, the stronger competitor may crush out the weaker; fluctuations in prices may be caused that result in wreck and disaster; yet, balancing the benefits as against the evils, the law of competition remains as a controlling element in the business world. That free and unrestricted competition in the matter of railroad charges may be productive of evils does not militate against the fact that such is the law now governing the subject. No law can be enacted nor system be devised for the control of human affairs that in its enforcement does not produce some evil results, no matter how beneficial its general purpose may be. There are benefits and there are evils which result from the operation of the law of free competition between railway companies. The time may come when the companies will be relieved from the operation of this law, but they cannot, by combination and agreements

among themselves, bring about this change. The fact that the provisions of the interstate commerce act may have changed in many respects the conduct of the companies in the carrying on of the public business they are engaged in does not show that it was the intent of congress, in the enactment of that statute, to clothe railway companies with the right to combine together for the purpose of avoiding the effects of competition on the subject of rates."

The whole opinion is a remarkably strong presentation of the views of the learned judge who wrote it.

Still, again, it is answered that the effects of free competition among railroad companies, as described by the counsel for the companies themselves in the course of their argument, are greatly exaggerated. According to that argument, the moment an agreement of this nature is prohibited the railroads commence to cut their rates, and they cease only with their utter financial ruin, leaving, perhaps, one to raise rates indefinitely when its rivals have been driven away. It is said that this is a most overdrawn statement, and that, while absolutely free competition may have in some instances and for a time resulted in injury to some of the railroads, it is not at all clear that the general result has been other than beneficial to the whole public, and not in the long run detrimental to the prosperity of the roads. It is matter of common knowledge that agreements as to rates have been continually made of late years, and that complaints of each company in regard to the violation of such agreements by its rivals have been frequent and persistent. Rate wars go on notwithstanding any agreement to the contrary, and the struggle for business among competing roads keeps on, and, in the nature of things, will keep on, any alleged agreement to the contrary notwithstanding; and it is only by the exercise of good sense, and by the presence of a common interest, that railroads, without entering into any affirmative agreement in regard thereto, will keep within the limit of exacting a fair and reasonable return for services rendered. These agreements have never been found really effectual for any extended period.

The interstate commerce commission, from whose reports quotations have been quite freely made by counsel for the purpose of proving the views of its learned members in regard

to this subject, has never distinctly stated that agreements among competing railroads to maintain prices are to be commended, or that the general effect is to be regarded as beneficial. They have stated in their fourth annual report that competition may degenerate into rate wars, and that such wars are as unsettling to the business of the country as they are mischievous to the carriers, and that the spirit of existing law is against them. They then add: "Agreements between railroad companies which from time to time they have entered into with a view to prevent such occurrences have never been found effectual, and for the very sufficient reason that the mental reservations in forming them have been quite as numerous and more influential than the written stipulations." It would seem true, therefore, that there is no guaranty of financial health to be found in entering into agreements for the maintenance of rates, nor is financial ruin or insolvency the necessary result of their absence.

The claim that the company has the right to charge reasonable rates, and that, therefore, it has the right to enter into a combination with competing roads to maintain such rates, cannot be admitted. The conclusion does not follow from an admission of the premise. What one company may do in the way of charging reasonable rates is radically different from entering into an agreement with other and competing roads to keep up the rates to that point. If there be any competition, the extent of the charge for the service will be seriously affected by that fact. Competition will itself bring charges down to what may be reasonable, while, in the case of an agreement to keep prices up, competition is allowed no play. It is shut out, and the rate is practically fixed by the companies themselves by virtue of the agreement, so long as they abide by it.

As a result of this review of the situation, we find two very widely divergent views of the effects which might be expected to result from declaring illegal all contracts in restraint of trade, etc.; one side predicting financial disaster and ruin to competing railroads, including thereby the ruin of shareholders, the destruction of immensely valuable properties, and the consequent prejudice to the public interest; while on the other side predictions equally earnest are made that no such

mournful results will follow, and it is urged that there is a necessity, in order that the public interest may be fairly and justly protected, to allow free and open competition among railroads upon the subject of the rates for the transportation of persons and property.

The arguments which have been addressed to us against the inclusion of all contracts in restraint of trade, as provided for by the language of the act, have been based upon the alleged presumption that congress, notwithstanding the language of the act, could not have intended to embrace all contracts, but only such contracts as were in unreasonable restraint of trade. Under these circumstances, we are therefore asked to hold that the act of congress excepts contracts which are not in unreasonable restraint of trade, and which only keep rates up to a reasonable price, notwithstanding the language of the act makes no such exception. In other words, we are asked to read into the act, by way of judicial legislation, an exception that is not placed there by the lawmaking branch of the government, and this is to be done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed congress intended the natural import of the language it used. This we cannot and ought not to do. That impolicy is not so clear, nor are the reasons for the exception so potent, as to permit us to interpolate an exception into the language of the act, and to thus materially alter its meaning and effect. It may be that the policy evidenced by the passage of the act itself will, if carried out, result in disaster to the roads, and in a failure to secure the advantages sought from such legislation. Whether that will be the result or not we do not know and cannot predict. These considerations are, however, not for us. If the act ought to read as contended for by defendants, congress is the body to amend it, and not this court, by a process of judicial legislation wholly unjustifiable. Large numbers do not agree that the view taken by defendants is sound or true in substance, and congress may, and very probably did, share in that belief in passing the act. The public policy of the government is to be found in its statutes, and, when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials; but when the lawmaking power

speaks upon a particular subject, over which it has constitutional power to legislate, public policy in such a case is what the statute enacts. If the law prohibit any contract or combination in restraint of trade or commerce, a contract or combination made in violation of such law is void, whatever may have been theretofore decided by the courts to have been the public policy of the country on that subject.

The conclusion which we have drawn from the examination above made into the question before us is that the anti-trust act applies to railroads, and that it renders illegal all agreements which are in restraint of trade or commerce, as we have above defined that expression, and the question then arises whether the agreement before us is of that nature.

Although the case is heard on bill and answer, thus making it necessary to assume the truth of the allegations in the answer which are well pleaded, yet the legal effect of the agreement itself cannot be altered by the answer, nor can its violation of law be made valid by allegations of good intention or of desire to simply maintain reasonable rates; nor can the plaintiffs' allegations as to the intent with which the agreement was entered into be regarded, as such intent is denied on the part of the defendants; and, if the intent alleged in the bill were a necessary fact to be proved in order to maintain the suit, the bill would have to be dismissed. In the view we have taken of the question, the intent alleged by the government is not necessary to be proved. The question is one of law in regard to the meaning and effect of the agreement itself, namely, does the agreement restrain trade or commerce in any way so as to be a violation of the act? We have no doubt that it does. The agreement on its face recites that it is entered into "for the purpose of mutual protection by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local." To that end the association is formed, and a body created which is to adopt rates, which, when agreed to, are to be the governing rates for all the companies, and a violation of which subjects the defaulting company to the payment of a penalty; and, although the parties have a right to withdraw from the agreement on giving 30 days' notice of a desire so to do, yet while in force, and assuming it to be lived up to, there can be no

doubt that its direct, immediate, and necessary effect is to put a restraint upon trade or commerce as described in the act.

For these reasons, the suit of the government can be maintained without proof of the allegation that the agreement was entered into for the purpose of restraining trade or commerce, or for maintaining rates above what was reasonable. The necessary effect of the agreement is to restrain trade or commerce, no matter what the intent was on the part of those who signed it.

One or two subsidiary questions remain to be decided.

It is said that to grant the injunction prayed for in this case is to give the statute a retroactive effect; that the contract, at the time it was entered into, was not prohibited or declared illegal by the statute, as it had not then been passed, and to now enjoin the doing of an act which was legal at the time it was done would be improper. We give to the law no retroactive effect. The agreement in question is a continuing one. The parties to it adopt certain machinery, and agree to certain methods for the purpose of establishing and maintaining in the future reasonable rates for transportation. Assuming such action to have been legal at the time the agreement was first entered into, the continuation of the agreement, after it has been declared to be illegal, becomes a violation of the act. The statute prohibits the continuing or entering into such an agreement for the future, and, if the agreement be continued, it then becomes a violation of the act. There is nothing of an *ex post facto* character about the act. The civil remedy by injunction and the liability to punishment under the criminal provisions of the act are entirely distinct, and there can be no question of any act being regarded as a violation of the statute which occurred before it was passed. After its passage, if the law be violated, the parties violating it may render themselves liable to be punished criminally, but not otherwise.

It is also argued that the United States have no standing in court to maintain this bill; that they have no pecuniary interest in the result of the litigation, or in the question to be decided by the court. We think that the fourth section of the act invests the government with full power and authority to bring such an action as this, and, if the facts be proved, an injunction should issue. Congress, having the control of inter-

state commerce, has also the duty of protecting it, and it is entirely competent for that body to give the remedy by injunction, as more efficient than any other civil remedy. The subject is fully and ably discussed in the case of *In re Debs*, 158 U. S. 564. See, also, *Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 184; *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197.

For the reasons given, the decrees of the United States circuit court of appeals and of the circuit court for the district of Kansas must be reversed, and the case remanded to the circuit court for further proceedings in conformity with this opinion.

MR. JUSTICE WHITE, with whom concurred Mr. Justice FIELD, Mr. Justice GRAY and Mr. Justice SHIRAS, dissenting.

It is unnecessary to refer to the authorities showing that, although a contract may in some measure restrain trade, it is not for that reason void, or even voidable, unless the restraint which it produces be unreasonable. The opinion of the court concedes this to be the settled doctrine.

The contract between the railway companies which the court holds to be void because it is found to violate the act of congress of the 2d of July, 1890 (26 Stat. 209), substantially embodies only an agreement between the corporations by which a uniform classification of freight is obtained, by which the secret undercutting of rates is sought to be avoided, and the rates as stated in the published rate sheets, and which, as a general rule, are required by law to be filed with the interstate commerce commission, are secured against arbitrary and sudden changes. I content myself with giving this mere outline of the results of the contract, and do not stop to demonstrate that its provisions are reasonable, since the opinion of the court rests upon that hypothesis. I commence, then, with these two conceded propositions, one of law and the other of fact: First, that only such contracts as unreasonably restrain trade are violative of the general law; and, second, that the particular contract here under consideration is reasonable, and therefore not unlawful, if the general principles of law are to be applied to it.

The theory upon which the contract is held to be illegal is

that even though it be reasonable, and hence valid, under the general principles of law, it is yet void, because it conflicts with the act of congress already referred to. Now, at the outset, it is necessary to understand the full import of this conclusion. As it is conceded that the contract does not unreasonably restrain trade, and that, if it does not so unreasonably restrain, it is valid under the general law, the decision substantially, is that the act of congress is a departure from the general principles of law, and by its terms destroys the right of individuals or corporations to enter into very many reasonable contracts. But this proposition, I submit, is tantamount to an assertion that the act of congress is itself unreasonable. The difficulty of meeting, by reasoning, a premise of this nature is frankly conceded; for, of course, where the fundamental proposition upon which the whole contention rests is that the act of congress is unreasonable, it would seem conducive to no useful purpose to invoke reason as applicable to and as controlling the construction of a statute which is admitted to be beyond the pale of reason. The question then is, is the act of congress relied on to be so interpreted as to give it a reasonable meaning, or is it to be construed as being unreasonable and as violative of the elementary principles of justice?

The argument upon which it is held that the act forbids those reasonable contracts which are universally admitted to be legal is thus stated in the opinion of the court, and I quote the exact language in which it is there expressed, lest, in seeking to epitomize, I may not accurately reproduce the thought which it conveys:

"Contracts in restraint of trade have been known and spoken of for hundreds of years both in England and in this country, and the term includes all kinds of those contracts which in fact restrain trade. Some of such contracts have been held void and unenforceable in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. A contract may be in restraint of trade, and still be valid at common law. Although valid, it is nevertheless a contract in restraint of trade, and would be so described either at common law or elsewhere. By the simple use of the term 'contract in restraint

of trade,' all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by congress."

To state the proposition in the form in which it was earnestly pressed in the argument at bar, it is as follows: Congress has said every contract in restraint of trade is illegal. When the law says "every," there is no power in the courts, if they correctly interpret and apply the statute, to substitute the word "some" for the word "every." If congress had meant to forbid only restraints of trade which were unreasonable, it would have said so. Instead of doing this, it has said "every," and this word of universality embraces both contracts which are reasonable and unreasonable.

Is the proposition which is thus announced by the court, and which was thus stated at bar, well founded? is the first question which arises for solution. I quote the title and the first section of the act which, it is asserted, if correctly interpreted, destroys the right to make just and reasonable contracts: "An act to protect trade and commerce against unlawful restraints and monopolies.

"Every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court."

Is it correct to say that at common law the words "restraint of trade" had a generic signification which embraced all contracts which restrained the freedom of trade, whether reason-

able or unreasonable, and, therefore, that all such contracts are within the meaning of the words "every contract in restraint of trade?" I think a brief consideration of the history and development of the law on the subject will not only establish the inaccuracy of this proposition, but also demonstrate that the words "restraint of trade" embrace only contracts which unreasonably restrain trade, and therefore, that reasonable contracts, although they, in some measure, "restrain trade," are not within the meaning of the words. It is true that in the adjudged cases language may be found referring to contracts in restraint of trade which are valid because reasonable. But this mere form of expression, used not as a definition, does not maintain the contention that such contracts are embraced within the general terms "every contract in restraint of trade." The rudiments of the doctrine of contracts in restraint of trade are found in the common law at a very early date. The first case on the subject is reported in Y. B. 2 Hen. V. fol. 5, p. 26, and is known as Dier's case. That was an action of damages upon a bond conditioned that the defendant should not practice his trade as a dyer at a particular place during a limited period, and it was held that the contract was illegal. The principle upon which this case was decided was not described as one forbidding contracts in restraint of trade, but was stated to be one by which contracts restricting the liberty of the subject were forbidden. The doctrine declared in that case was applied in subsequent cases in England prior to the case of *Mitchell v. Reynolds*, decided in 1711, and reported in 1 P. Wms. 181. There the distinction between general restraints and partial restraints was first definitely formulated, and it was held that a contract creating a partial restraint was valid, and one creating a general restraint was not. The theory of partial and general restraints established by that case was followed in many decided cases in England—not, however, without the correctness of the difference between the two being in some instances denied and in others questioned, until the matter was set finally at rest by the house of lords in *Nordenfelt v. Ammunition Co.*, reported in (1894) App. Cas. 535. In that case it was held that the distinction between partial and general restraint was an incorrect criterion, but that whether a contract was invalid because

in restraint of trade must depend upon whether, on considering all the circumstances, the contract was found to be reasonable or unreasonable. If reasonable, it was not a contract in restraint of trade, and, if unreasonable, it was.

The decisions of the American courts substantially conform to both the development and ultimate results of the English cases. While the rule of partial and general restraint has been either expressly or impliedly admitted, the exact scope of the distinction between the two has been the subject of discussion and varying adjudication. And although it is accurate to say that in the cases expressions may be found speaking of contracts as being, in form, in restraint of trade, and yet valid, it results from an analysis of all the American cases, as it does from the English, that these expressions in no way imply that contracts which were valid because they only partially restrained trade were yet considered as embraced within the definition of "contracts in restraint of trade." On the contrary, the reason of the cases, where contracts partially restraining trade were excepted, and hence held to be valid, was because they were not contracts in restraint of trade, in the legal meaning of those words. Referring to the modern and American rule on the subject, Beach, in his recent treatise on the Modern Law of Contracts, at section 1569, says:

"The tendency of modern thought and decisions has been no longer to uphold in its strictness the doctrine which formerly prevailed respecting agreements in restraint of trade. The severity with which such agreements were treated in the beginning has relaxed more and more by exceptions and qualifications, and a gradual change has taken place, brought about by the growth of industrial activities and the enlargement of commercial facilities which tend to render such agreements less dangerous, because monopolies are less easy of accomplishment."

The fact that the exclusion of reasonable contracts from the doctrine of restraint of trade was predicated on the conclusion that such contracts were no longer considered as coming within the meaning of the words "restraint of trade" is nowhere more clearly and cogently stated than in the opinion of the court of appeals of the state of New York in the case of *Matthews v. Associated Press*, 136 N. Y. 333, 32 N. E. 981.

In considering the contention that a by-law of the defendant association which prohibited its members from receiving or publishing "the regular news dispatches of any other news association covering a like territory and organized for a like purpose" was void, because it tended to restrain trade and competition and to create a monopoly, the learned judge said (page 340, 136 N. Y.):

"We do not think the by-law improperly tends to restrain trade, assuming that the business of collecting and distributing news would come within the definition of 'a trade.' The latest decisions of courts in this country and in England show a strong tendency to very greatly circumscribe and narrow the doctrine of avoiding contracts in restraint of trade. The courts do not go to the length of saying that contracts which they now would say are in restraint of trade are nevertheless valid contracts, and to be enforced. They do, however, now hold many contracts not open to the objection that they are in restraint of trade which a few years back would have been avoided on that sole ground both here and in England. The cases in this court which are the latest manifestations of the turn in the tide are cited in the opinion in this case at general term, and are *Match Co. v. Roeber*, 106 N. Y. 473; *Hodge v. Sloan*, 107 N. Y. 244; *Leslie v. Lorillard*, 110 N. Y. 519.

"So that, when we agree that a by-law which is in restraint of trade is void, we are still brought back to the question, what is a 'restraint of trade,' in the modern definition of that term? The authority to make by-laws must also be limited by the scope and purpose of the association. I think this by-law is thus limited, and that it is not 'in restraint of trade,' as the courts now interpret that phrase."

This lucid statement aptly sums up the process of reasoning by which partial and reasonable contracts came no longer to be considered as included in the words "contracts in restraint of trade," and points to the fallacy embodied in the proposition that contracts which were held not to be in restraint of trade were yet covered by the words "in restraint of trade"; that is, that, although they were not such contracts, yet they continued so to be. After analyzing the provisions of the by-law, the opinion proceeds as follows (page 341, 136 N. Y.):

"Thus, a by-law of the nature complained of would have a

tendency to strengthen the association, and to render it more capable of filling the duty it was incorporated to perform. A business partnership could provide that none of its members should attend to any business other than that of the partnership, and that each partner who came in must agree not to do any other business, and must give up all such business as he had theretofore done. Such an agreement would not be in restraint of trade, although its direct effect might be to restrain to some extent the trade which had been done."

This adds cogency to the demonstration, and shows in the most conclusive manner that the words "contracts in restraint of trade" do not continue to define those contracts which are no longer covered by the legal meaning of the words.

This court has not only recognized and applied the distinction between partial and general restraints, but has also decided that the true test whether a contract be in restraint of trade is not whether, in a measure, it produces such effect, but whether, under all the circumstances, it is reasonable. *Navigation Co. v. Winsor*, 20 Wall. 64, 68; *Gibbs v. Gas Co.*, 130 U. S. 396, 409. As it is unnecessary here to enter into a detailed examination of the cases, I append in the margin a reference to decisions of some of the state courts, and to several writers on the subject of contracts in restraint of trade, by whom the doctrine is reviewed and the authorities very fully referred to.¹⁵

It follows from the foregoing statement that at common law contracts which only partially restrain trade, to use the precise language of MAULE, J., in *Rannie v. Irvine*, 7 Man. & G. 977, were "an exception ingrafted upon that rule"; that is, the rule as to contracts in restraint of trade, "and that the exception is in furtherance of the rule itself." I submit, also, manifestly, that the further development of the doctrine by

15—*Diamond Match Co. v. Roeber*, 106 N. Y. 473; *Leslie v. Lorillard*, 110 N. Y. 519, 533; *Beal v. Chase*, 31 Mich. 490, 518; *National Ben. Co. v. Union Hospital Co.*, 45 Minn. 272; *Ellerman v. Stock Yards Co.*, 49 N. J. Eq. 215, 217; *Richards v. Seating Co.*, 87 Wis. 503, 514; note to 2

Pars. Cont. p. 748; note to *Angier v. Webber* (1867) 92 Am. Dec. 751; note to *Mitchel v. Reynolds*, 1 Smith, Lead. Cas. 705, and supplemental note (9th Am. Ed.) 716 (1888); review of cases by A. M. Eaton in 4 Harv. Law Rev. p. 129 (1890); *Patt. Restr. Trade* (1891).

which it was decided that, if a contract was reasonable, it would not be held to be included within contracts in restraint of trade, although such contract might in some measure produce such an effect, was also an exception to the general rule as to the invalidity of contracts in restraint of trade. The theory, then, that the words "restraint of trade" define and embrace all such contracts, without reference to whether they are reasonable, amounts substantially to saying that, by the common law and the adjudged American cases, certain classes of contracts were carved out of and excepted from the general rule, and yet were held to remain embraced within the general rule from which they were removed. But the obvious conflict which is shown by this contradictory result to which the contention leads rests, not upon the mere form of statement, but upon the reason of things. This will, I submit, be shown by a very brief analysis of the reasons by which partial restraints were held not to be embraced in contracts in restraint of trade, and by which ultimately all reasonable contracts were likewise decided not to be so embraced; that is to say, that the reasoning by which the exceptions were created conclusively shows the error of contending that the words "contracts in restraint of trade" continued to embrace those reasonable contracts which those words no longer described.

It is perhaps true that the principle by which contracts in restraint of the freedom of the subject or of trade were held to be illegal was first understood to embrace all contracts which in any degree accomplished these results. But, as trade developed, it came to be understood that, if contracts which only partially restrained the freedom of the subject or of trade were embraced in the rule forbidding contracts in restraint of trade, both the freedom of contract and trade itself would be destroyed. Hence, from the reason of things, arose the distinction that, where contracts operated only a partial restraint of the freedom of contract or of trade, they were not, in contemplation of law, contracts in restraint of trade. And it was this conception also which, in its final aspect, led to the knowledge that reason was to be the criterion by which it was to be determined whether a contract which in some measure restrained the freedom of contract and of trade was in reality, when considered in all its aspects, a contract of that

character, or one which was necessary to the freedom of contract and of trade. To define, then, the words "in restraint of trade" as embracing every contract which in any degree produced that effect, would be violative of reason, because it would include all those contracts which are the very essence of trade, and would be equivalent to saying that there should be no trade, and therefore nothing to restrain. The dilemma which would necessarily arise from defining the words "contracts in restraint of trade" so as to destroy trade by rendering illegal the contracts upon which trade depends, and yet presupposing that trade would continue, and should not be restrained, is shown by an argument advanced, and which has been compelled by the exigency of the premise upon which it is based. Thus, after insisting that the word "every" is all-embracing, it is said from the necessity of things it will not be held to apply to covenants in restraint of trade which are collateral to a sale of property, because not "supposed" to be within the letter or spirit of the statute. But how, I submit, can it be held that the words "every contract in restraint of trade" embrace all such contracts, and yet at the same time it be said that certain contracts of that nature are not included? The asserted exception not only destroys the rule which is relied on, but it rests upon no foundation of reason. It must either result from the exclusion of particular classes of contracts, whether they be reasonable or not, or it must arise from the fact that the contracts referred to are merely collateral contracts. But many collateral contracts may contain provisions which make them unreasonable. The exception which is relied upon, therefore, as rendering possible the existence of trade to be restrained, is either arbitrary or it is unreasonable.

But admitting, *arguendo*, the correctness of the proposition by which it is sought to include every contract, however reasonable, within the inhibition of the law, the statute, considered as a whole, shows, I think, the error of the construction placed upon it. Its title is, "An act to protect trade and commerce against unlawful restraints and monopolies." The word "unlawful" clearly distinguishes between contracts in restraint of trade which are lawful and those which are not; in other words, between those which are unreasonably in restraint of

trade, and consequently invalid, and those which are reasonable and hence lawful. When, therefore, in the very title of the act, the well-settled distinction between lawful and unlawful contracts is broadly marked, how can an interpretation be correct which holds that all contracts, whether lawful or not, are included in its provisions? While it is true that the title of an act cannot be used to destroy the plain import of the language found in its body, yet, when a literal interpretation will work out wrong or injury, or where the words of the statute are ambiguous, the title may be resorted to as an instrument of construction. In *U. S. v. Palmer*, 3 Wheat. 610, where general language found in the body of a criminal statute was given a narrow and restricted meaning, Mr. Chief Justice MARSHALL, in the course of the opinion, said (page 631): "The title of an act cannot control its words, but may furnish some aid in showing what was in the mind of the legislature. The title of this act is, 'An act for the punishment of certain crimes against the United States.' It would seem that offenses against the United States, not offenses against the human race, were the crimes which the legislature intended by this law to punish."

So, also, in *U. S. v. Union Pac. R. Co.*, 91 U. S. 72, where the construction of a statute was involved, it was held that the interpretation adopted was supported by the title, which disclosed the general purpose which congress had in view in adopting the law under consideration. The same rule was announced in *Smythe v. Fiske*, 23 Wall. 374, 380, and *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550, and cases there cited.

Pretermittting the consideration of the title, it cannot be denied that the words "restraint of trade," used in the act in question, had, long prior to the adoption of that act, been construed as not embracing reasonable contracts. The well-settled rule is that, where technical words are used in an act, and their meaning has previously been conclusively settled by long usage and judicial construction, the use of the words without an indication of an intention to give them a new significance is an adoption of the generally accepted meaning affixed to the words at the time the act was passed. Particularly is this rule imperative where the statute in which the

words are used creates a crime, as does the statute under consideration, and gives no specific definition of the crime created. Thus in *U. S. v. Palmer*, *supra*, Mr. Chief Justice MARSHALL, referring to the term "robbery," as used in the statute, said (page 630): "Of the meaning of the term 'robbery' as used in the statute, we think no doubt can be entertained. It must be understood in the sense in which it is recognized and defined at common law."

If these obvious rules of interpretation be applied, it seems to me they render it impossible to construe the words "every restraint of trade," used in the act, in any other sense than as excluding reasonable contracts, as the fact that such contracts were not considered to be within the rule of contracts in restraint of trade was thoroughly established, both in England and in this country, at the time the act was adopted. It is, I submit, not to be doubted that the interpretation of the words "every contract in restraint of trade" so as to embrace within its purview every contract, however reasonable, would certainly work an enormous injustice, and operate to the undue restraint of the liberties of the citizen. But there is no canon of interpretation which requires that the letter be followed, when by so doing an unreasonable result is accomplished. On the contrary, the rule is the other way, and exacts that the spirit which vivifies, and not the letter which killeth, is the proper guide by which to correctly interpret a statute. In *Smythe v. Fiske*, 23 Wall. 374, 380, this court declared that: "A thing may be within the letter of the statute, and not within its meaning, and within its meaning, though not within its letter. The intention of the lawmaker is the law." In *Lau Ow Bew v. U. S.*, 144 U. S. 47, this court, speaking through Mr. Chief Justice FULLER, said (page 59, 144 U. S.):

"Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion. *Church of Holy Trinity v. U. S.*, 143 U. S. 457; *Henderson v. Mayor, etc.*, 92 U. S. 259; *U. S. v. Kirby*, 7 Wall. 482; *Oates v. Bank*, 100 U. S. 239."

In all the cases there cited the literal language of the statutes was disregarded, in order to restrict its operation within reason. To those cases may also be added *U. S. v. Mooney*,

116 U. S. 104, where it was contended that by the act of March 3, 1875, c. 137, the circuit courts were vested with jurisdiction concurrent with district courts over certain suits. The plausibility of the argument, based upon the literal language of the statute, was conceded by the court, but the results which would follow from sustaining the construction contended for were pointed out by the court, and it was observed (page 107, 116 U. S.): "A construction which involves such results was clearly not contemplated by congress."

Indeed, it seems to me there can be no doubt that reasonable contracts cannot be embraced within the provisions of the statute if it be interpreted by the light of the supreme rule commanding that the intention of the law must be carried out, and it must be so construed as to afford the remedy and frustrate the wrong contemplated by its enactment.

The plain intention of the law was to protect the liberty of contract and the freedom of trade. Will this intention not be frustrated by a construction which, if it does not destroy, at least gravely impairs, both the liberty of the individual to contract and the freedom of trade? If the rule of reason no longer determines the right of the individual to contract, or secures the validity of contracts upon which trade depends and results, what becomes of the liberty of the citizen or of the freedom of trade? Secured no longer by the law of reason, all these rights become subject, when questioned, to the mere caprice of judicial authority. Thus, a law in favor of freedom of contract, it seems to me, is so interpreted as to gravely impair that freedom. Progress, and not reaction, was the purpose of the act of congress. The construction now given the act disregards the whole current of judicial authority, and tests the right to contract by the conceptions of that right entertained at the time of the Year Books, instead of by the light of reason and the necessity of modern society. To do this violates, as I see it, the plainest conception of public policy, for, as said by Sir G. JESSEL, M. R., in *Printing Co. v. Sampson*, L. R. 19 Eq. 465: "If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and their contracts, when entered into freely and

voluntarily, shall be held sacred, and shall be enforced by courts of justice."

The remedy intended to be accomplished by the act of congress was to shield against the danger of contract or combination by the few against the interest of the many, and to the detriment of freedom. The construction now given, I think, strikes down the interest of the many to the advantage and benefit of the few. It has been held in a case involving a combination among workingmen that such combinations are embraced in the act of congress in question, and this view was not doubted by this court. *In re Debs*, 64 Fed. 724, 745-755; *Id.*, 158 U. S. 564. The interpretation of the statute, therefore, which holds that reasonable agreements are within its purview, makes it embrace every peaceable organization or combination of the laborer to benefit his condition either by obtaining an increase of wages or diminution of the hours of labor. Combinations among labor for this purpose were treated as illegal under the construction of the law which included reasonable contracts within the doctrine of the invalidity of contract or combinations in restraint of trade, and they were only held not to be embraced within that doctrine either by statutory exemption therefrom, or by the progress which made reason the controlling factor on the subject. It follows that the construction which reads the rule of reason out of the statute embraces within its inhibition every contract or combination by which workingmen seek to peaceably better their condition. It is, therefore, as I see it, absolutely true to say that the construction now adopted, which works out such results, not only frustrates the plain purpose intended to be accomplished by congress, but also makes the statute tend to an end never contemplated, and against the accomplishment of which its provisions were enacted.

But conceding, for the sake of argument, that the words "every contract in restraint of trade," as used in the act of congress in question, prohibit all such contracts, however reasonable they may be, and therefore that all that great body of contracts which are commonly entered into between individuals or corporations, and which promote and develop trade, and which have been heretofore considered as lawful, are no longer such; and conceding also that agreements entered into

by associations of workmen to peaceably better their condition, either by obtaining an increase or preventing a decrease of wages, or by securing a reduction in the hours of labor, or for mutually protecting each other from unjust discharge, or for other reasonable purposes, have become unlawful—it remains to consider whether the provisions of the act of 1890 were intended to apply to agreements made between carriers for the purpose of classifying the freight to be by them carried, or preventing secret cutting of the published rates; in other words, whether the terms of the statute were intended to apply to contracts between carriers entered into for the purpose of securing fairness in their dealings with each other, and tending to protect the public against improper discrimination and sudden changes in rates. To answer this question involves deciding whether the act here relied upon was intended to abrogate the provisions of the act of congress of the 4th of February, 1887, and the amendments thereto, commonly known as the “Interstate Commerce Act.” The question is not whether railway companies may not violate the terms of the statute of 1890 if they do acts which it forbids and punishes, but whether that statute was intended to abrogate the power of railway companies to make contracts with each other which are either expressly sanctioned by the interstate commerce act, or the right to make which arises by reasonable implication from the terms of that act; that is to say, not whether the act of 1890 is not operative upon all persons and corporations, but whether, being so generally operative, it was intended to forbid, as in restraint of trade, all contracts on the subjects embraced within and controlled by the interstate commerce law.

[Balance of opinion omitted.]

UNITED STATES v. JOINT-TRAFFIC ASSOCIATION

(Supreme Court of United States, 1898. 171 U. S. 505.)

MR. JUSTICE PECKHAM ¹⁶ [after finding that the agreements involved in the Trans-Missouri case and in the case at

¹⁶—Statement of facts and arguments of counsel omitted; also part of opinion only given.

bar were "alike in their main and material features" and that the Sherman Anti-Trust Act was constitutional, proceeds as follows: p. 573]:

Finally, we are asked to reconsider the question decided in the *Trans-Missouri Case*, and to retrace the steps taken therein, because of the plain error contained in that decision, and the widespread alarm with which it was received, and the serious consequences which have resulted, or may soon result, from the law as interpreted in that case.

It is proper to remark that an application for a reconsideration of a question but lately decided by this court is usually based upon a statement that some of the arguments employed on the original hearing of the question have been overlooked or misunderstood, or that some controlling authority has been either misapplied by the court or passed over without discussion or notice. While this is not strictly an application for a rehearing in the same case, yet in substance it is the same thing. The court is asked to reconsider a question but just decided after a careful investigation of the matter involved. There have heretofore been in effect two arguments of precisely the same questions now before the court, and the same arguments were addressed to us on both those occasions. The report of the *Trans-Missouri Case* shows a dissenting opinion delivered in that case, and that the opinion was concurred in by three other members of the court.

That opinion, it will be seen, gives with great force and ability the arguments against the decision which was finally arrived at by the court. It was after a full discussion of the questions involved, and with the knowledge of the views entertained by the minority as expressed in the dissenting opinion, that the majority of the court came to the conclusion it did. Soon after the decision a petition for a rehearing of the case was made, supported by a printed argument in its favor, and pressed with an earnestness and vigor and at a length which were certainly commensurate with the importance of the case.

This court, with care and deliberation, and also with a full appreciation of their importance, again considered the questions involved in its former decision.

A majority of the court once more arrived at the conclusion

it had first announced, and accordingly it denied the application. And now, for the third time, the same arguments are employed, and the court is again asked to recant its former opinion, and to decide the same question in direct opposition to the conclusion arrived at in the *Trans-Missouri Case*.

The learned counsel, while making the application, frankly confess that the argument in opposition to the decision in the case above named has been so fully, so clearly, and so forcibly presented in the dissenting opinion of Mr. Justice WHITE that it is hardly possible to add to it, nor is it necessary to repeat it.

The fact that there was so close a division of opinion in this court when the matter was first under advisement, together with the different views taken by some of the judges of the lower courts, led us to the most careful and scrutinizing examination of the arguments advanced by both sides, and it was after such an examination that the majority of the court came to the conclusion it did.

It is not now alleged that the court on the former occasion overlooked any argument for the respondents or misapplied any controlling authority. It is simply insisted that the court, notwithstanding the arguments for an opposite view, arrived at an erroneous result, which, for reasons already stated, ought to be reconsidered and reversed.

As we have twice already deliberately and earnestly considered the same arguments which are now for a third time pressed upon our attention, it could hardly be expected that our opinion should now change from that already expressed.

While an erroneous decision might be in some cases properly reconsidered and overruled, yet it is clear that the first necessity is to convince the court that the decision was erroneous. It is scarcely to be assumed that such a result could be secured by the presentation for a third time of the same arguments which had twice before been unsuccessfully urged upon the attention of the court.

We have listened to them now because the eminence of the counsel engaged, their earnestness and zeal, their evident belief in the correctness of their position, and, most important of all, the very grave nature of the questions argued, called upon the court to again give to those arguments strict and

respectful attention. It is not matter for surprise that we still are unable to see the error alleged to exist in our former decision, or to change our opinion regarding the questions therein involved.

Upon the point that the agreement is not in fact one in restraint of trade, even though it did prevent competition, it must be admitted that the former argument has now been much enlarged and amplified, and a general and most masterly review of that question has been presented by counsel for the respondents. That this agreement does in fact prevent competition, and that it must have been so intended, we have already attempted to show. Whether stifling competition tends directly to restrain commerce in the case of naturally competing railroads is a question upon which counsel have argued with very great ability. They acknowledge that this agreement purports to restrain competition, although, they say, in a very slight degree, and on a single point. They admit that, if competition and commerce were identical, being but different names for the same thing, then, in assuming to restrain competition even so far, it would be assuming in a corresponding degree to restrain commerce. Counsel then add (and therein we entirely agree with them) that no such identity can be pretended, because it is plain that commerce can and does take place on a large scale, and in numerous forms, without competition. The material considerations therefore turn upon the effects of competition upon the business of railroads—whether they are favorable to the commerce in which the roads are engaged, or unfavorable, and in restraint of that commerce. Upon that question it is contended that agreements between railroad companies of the nature of that now before us are promotive, instead of in restraint, of trade.

This conclusion is reached by counsel after an examination of the peculiar nature of railroad property, and the alleged baneful effects of competition upon it and also upon the public. It is stated that the only resort open to railroads to save themselves from the effects of a ruinous competition is that of agreements among themselves to check and control it. A ruinous competition is, as they say, apt to be carried on until the weakest of the combatants goes to destruction. After

that the survivor, being relieved from competition, proceeds to raise its prices as high as the business will bear. Commerce, it is said, thus finally becomes restrained by the effects of competition, while at the same time otherwise valuable railroad property is thereby destroyed, or greatly reduced in value. There can be no doubt that the general tendency of competition among competing railroads is towards lower rates for transportation, and the result of lower rates is generally a greater demand for the articles so transported, and this greater demand can only be gratified by a larger supply, the furnishing of which increases commerce. This is the first and direct result of competition among railroad carriers.

In the absence of any agreement restraining competition, this result, it is argued, is neutralized, and the opposite one finally reached, by reason of the peculiar nature of railroad property, which must be operated, and the capital invested in which cannot be withdrawn, and the railroad managers are therefore, as is claimed, compelled to not only compete among themselves for business, but also to carry on the war of competition until it shall terminate in the utter destruction or the buying up of the weaker roads, after which the survivor will raise the rates as high as is possible. Thus the indirect but final effect of competition is claimed to be the raising of rates, and the consequent restraint of trade, and it is urged that this result is only to be prevented by such an agreement as we have here. In that way alone it is said that competition is overcome, and general uniformity and reasonableness of rates securely established.

The natural, direct, and immediate effect of competition is, however, to lower rates, and to thereby increase the demand for commodities, the supplying of which increases commerce; and an agreement whose first and direct effect is to prevent this play of competition restrains, instead of promoting, trade and commerce. Whether, in the absence of an agreement as to rates, the consequences described by counsel will in fact follow as a result of competition, is matter of very great uncertainty, depending upon many contingencies, and in large degree upon the voluntary action of the managers of the several roads. Railroad companies may, and often do, continue in existence and engage in their lawful traffic at some

profit, although they are competing railroads, and are not acting under any agreement or combination with their competitors upon the subject of rates. It appears from the brief of counsel in this case that the agreement in question does not embrace all of the lines or systems engaged in the business of railroad transportation between Chicago and the Atlantic coast. It cannot be said that destructive competition, or, in other words, war to the death, is bound to result unless an agreement or combination to avoid it is entered into between otherwise competing roads.

It is not only possible, but probable, that good sense and integrity of purpose would prevail among the managers, and, while making no agreement and entering into no combination by which the whole railroad interest as herein represented should act as one combined and consolidated body, the managers of each road might yet make such reasonable charges for the business done by it as the facts might justify. An agreement of the nature of this one, which directly and effectually stifles competition, must be regarded under the statute as one in restraint of trade, notwithstanding there are possibilities that a restraint of trade may also follow competition that may be indulged in until the weaker roads are completely destroyed, and the survivor thereafter raises rates and maintains them.

Coming to the conclusion we do in regard to the various questions herein discussed, we think it unnecessary to further allude to the other reasons which have been advanced for a reconsideration of the decision in the *Trans-Missouri Case*.

The judgments of the circuit court of the United States for the Southern district of New York and of the circuit court of appeals for the Second circuit are reversed, and the case remanded to the circuit court, with directions to take such further proceedings therein as may be in conformity with this opinion.

Mr. Justice GRAY, Mr. Justice SHIRAS, and Mr. Justice WHITE dissented. Mr. Justice McKENNA took no part in the decision of the case.

NORTHERN SECURITIES COMPANY v. UNITED STATES

(Supreme Court of United States, 1904. 193 U. S. 197.)¹⁷

MR. JUSTICE HARLAN announced the affirmance of the decree of the circuit court, and delivered the following opinion:

This suit was brought by the United States against the Northern Securities Company, a corporation of New Jersey; the Great Northern Railway Company, a corporation of Minnesota; the Northern Pacific Railway Company, a corporation of Wisconsin; James J. Hill, a citizen of Minnesota; and William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker, and Daniel S. Lamont, citizens of New York.

Its general object was to enforce, as against the defendants, the provisions of the statute of July 2d, 1890, commonly known as the anti-trust act, and entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies." 26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200. By the decree below the United States was given substantially the relief asked by it in the bill.

As the act is not very long, and as the determination of the particular questions arising in this case may require a consideration of the scope and meaning of most of its provisions, it is here given in full:

[The act here quoted in full being the same as the act printed, p. 763 *et seq.*, *supra*, is omitted.]

Is the case as presented by the pleadings and the evidence one of a combination of a conspiracy in restraint of trade or commerce among the states, or with foreign states? Is it one in which the defendants are properly chargeable with monopolizing or attempting to monopolize any part of such trade or commerce? Let us see what are the facts disclosed by the record.

The Great Northern Railway Company and the Northern Pacific Railway Company owned, controlled, and operated separate lines of railway,—the former road extending from Superior, and from Duluth and St. Paul, to Everett, Seattle,

17—Only the opinion of the court and portions of the dissenting opinions are given.

and Portland, with a branch line to Helena; the latter extending from Ashland, and from Duluth and St. Paul, to Helena, Spokane, Seattle, Tacoma and Portland. The two lines, main and branches, about 9000 miles in length, were and are parallel and competing lines across the continent through the northern tier of states between the Great Lakes and the Pacific, and the two companies were engaged in active competition for freight and passenger traffic, each road connecting at its respective terminals with lines of railway, or with lake steamers, or with seagoing vessels.

Prior to 1893 the Northern Pacific system was owned or controlled and operated by the Northern Pacific Railroad Company, a corporation organized under certain acts and resolutions of Congress. That company becoming insolvent, its road and property passed into the hands of receivers appointed by courts of the United States. In advance of foreclosure and sale a majority of its bondholders made an arrangement with the Great Northern Railway Company for a virtual consolidation of the two systems, and for giving the practical control of the Northern Pacific to the Great Northern. That was the arrangement declared in *Pearsall v. Great Northern R. Co.* 161 U. S. 646, 40 L. ed. 838, to be illegal under the statutes of Minnesota which forbade any railroad corporation, or the purchasers or managers of any corporation, to consolidate the stock, property, or franchises of such corporation, or to lease or purchase the works or franchises of, or in any way control, other railroad corporations owning or having under their control parallel or competing lines. Minn. Gen. Laws, 1874, chap. 29, 1881, chap. 109.

Early in 1901 the Great Northern and Northern Pacific Railway Companies, having in view the ultimate placing of their two systems under a common control, united in the purchase of the capital stock of the Chicago, Burlington, & Quincy Railway Company, giving in payment, upon an agreed basis of exchange, the joint bonds of the Great Northern and Northern Pacific Railway Companies, payable in twenty years from date, with interest at 4 per cent per annum. In this manner the two purchasing companies became the owners of \$107,000,000 of the \$112,000,000 total capital stock of the Chicago, Burlington, & Quincy Railway Company, whose lines aggre-

gated about 8,000 miles, and extended from St. Paul to Chicago, and from St. Paul and Chicago to Quincy, Burlington, Des Moines, St. Louis, Kansas City, St. Joseph, Omaha, Lincoln, Denver, Cheyenne and Billings, where it connected with the Northern Pacific Railroad. By this purchase of stock the Great Northern and Northern Pacific acquired full control of the Chicago, Burlington, & Quincy main line and branches.

Prior to November 13th, 1901, defendant Hill and associate stockholders of the Great Northern Railway Company, and defendant Morgan and associate stockholders of the Northern Pacific Railway Company, entered into a combination to form, under the laws of New Jersey, a *holding* corporation, to be called the Northern Securities Company, with a capital stock of \$400,000,000, and to which company, in exchange for its own capital stock upon a certain basis and at a certain rate, was to be turned over the capital stock, or a controlling interest in the capital stock, of each of the constituent railway companies, with power in the holding corporation to vote such stock and in all respects to act as the owner thereof, and to do whatever it might deem necessary in aid of such railway companies or to enhance the value of their stocks. In this manner the interests of individual stockholders in the property and franchises of the two independent and competing railway companies were to be converted into an interest in the property and franchises of the holding corporation. Thus, as stated in article 6 of the bill, "by making the stockholders of each system jointly interested in both systems, and by practically pooling the earnings of both for the benefit of the former stockholders of each, and by vesting the selection of the directors and officers of each system in a common body, to wit, the holding corporation, with not only the power, but the duty, to pursue a policy which would promote the interests, not of one system at the expense of the other, but of both at the expense of the public, all inducement for competition between the two systems was to be removed, a virtual consolidation effected, and a monopoly of the interstate and foreign commerce formerly carried on by the two systems as independent competitors established."

In pursuance of this combination, and to effect its objects,

the defendant, the Northern Securities Company, was organized November 13th, 1901, under the laws of New Jersey.

Its certificate of incorporation stated that the objects for which the company was formed were: "1. To acquire by purchase, subscription, or otherwise, and to hold as investment, any bonds or other securities or evidences of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the state of New Jersey, or of any other state, territory, or country. 2. To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of any bonds or other securities or evidences of indebtedness created or issued by any other corporation or corporations, association or associations, of the state of New Jersey, or of any other state, territory, or country, and while owner thereof to exercise all the rights, powers, and privileges of ownership. 3. To purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of shares of the capital stock of any other corporation or corporations, association or associations, of the state of New Jersey, or of any other state, territory, or country, and while owner of such stock to exercise all the rights, powers, and privileges of ownership, including the right to vote thereon. 4. To aid in any manner any corporation or association of which any bonds or other securities or evidences of indebtedness or stock are held by the corporation, and to do any acts or things designed to protect, preserve, improve, or enhance the value of any such bonds or other securities or evidences of indebtedness or stock. 5. To acquire, own, and hold such real and personal property as may be necessary or convenient for the transaction of its business."

It was declared in the certificate that the business or purpose of the corporation was from time to time to do any one or more of such acts and things, and that the corporation should have power to conduct its business in other states and in foreign countries, and to have one or more offices, and hold, purchase, mortgage, and convey real and personal property, out of New Jersey.

The total authorized capital stock of the corporation was fixed at \$400,000,000, divided into 4,000,000 shares of the par value of \$100 each. The amount of the capital stock with

which the corporation should commence business was fixed at \$30,000. The duration of the corporation was to be perpetual.

This charter having been obtained, Hill and his associate stockholders of the Great Northern Railway Company, and Morgan and associate stockholders of the Northern Pacific Railway Company, assigned to the Securities Company a controlling amount of the capital stock of the respective constituent companies upon an agreed basis of exchange of the capital stock of the Securities Company for each share of the capital stock of the other companies.

In further pursuance of the combination, the Securities Company acquired additional stock of the defendant railway companies, issuing in lieu thereof its own stock upon the above basis, and, at the time of the bringing of this suit, held, as owner and proprietor, substantially all the capital stock of the Northern Pacific Railway Company, and, it is alleged, a controlling interest in the stock of the Great Northern Railway Company, "and is voting the same and is collecting the dividends thereon, and in all respects is acting as the owner thereof, in the organization, management, and operation of said railway companies and in the receipt and control of their earnings."

No consideration whatever, the bill alleges, has existed or will exist, for the transfer of the stock of the defendant railway companies to the Northern Securities Company, other than the issue of the stock of the latter company for the purpose, after the manner, and upon the basis stated.

The Securities Company, the bill also alleges, was not organized in good faith to purchase and pay for the stocks of the Great Northern and Northern Pacific Railway Companies, but solely "to incorporate the pooling of the stocks of said companies," and carry into effect the above combination; that it is a mere depository, custodian, holder, or trustee of the stocks of the Great Northern and Northern Pacific Railway Companies; that its shares of stock are but beneficial certificates against said railroad stocks to designate the interest of the holders in the pool; that it does not have and never had any capital to warrant such an operation; that its subscribed capital was but \$30,000, and its authorized capital stock of \$400,000,000 was just sufficient, when all issued, to represent

and cover the exchange value of substantially the entire stock of the Great Northern and Northern Pacific Railway Companies, upon the basis and at the rate agreed upon, which was about \$122,000,000 in excess of the combined capital stock of the two railway companies taken at par; and that, unless prevented, the Securities Company would acquire, as owner and proprietor, substantially all the capital stock of the Great Northern and Northern Pacific Railway Companies, issuing in lieu thereof its own capital stock to the full extent of its authorized issue, of which, upon the agreed basis of exchange, the former stockholders of the Great Northern Railway Company have received or would receive and hold about 55 per cent, the balance going to the former stockholders of the Northern Pacific Railway Company.

The government charges that if the combination was held not to be in violation of the act of Congress, then all efforts of the national government to preserve to the people the benefits of free competition among carriers engaged in interstate commerce will be wholly unavailing, and all transeontinental lines, indeed, the entire railway systems of the country, may be absorbed, merged, and consolidated, thus placing the public at the absolute mercy of the holding corporation.

The several defendants denied all the allegations of the bill imputing to them a purpose to evade the provisions of the act of Congress, or to form a combination or conspiracy having for its object either to restrain or to monopolize commerce or trade among the states or with foreign nations. They denied that any combination or conspiracy was formed in violation of the act.

In our judgment, the evidence fully sustains the material allegations of the bill, and shows a violation of the act of Congress, in so far as it declares illegal every combination or conspiracy in restraint of commerce among the several states and with foreign nations, and forbids attempts to monopolize such commerce or any part of it.

Summarizing the principal facts, it is indisputable upon this record that under the leadership of the defendants Hill and Morgan the stockholders of the Great Northern and Northern Pacific Railway corporations, having competing and substantially parallel lines from the Great Lakes and the Mississippi

river to the Pacific ocean at Puget sound combined and conceived the scheme of organizing a corporation under the laws of New Jersey which should *hold* the shares of the stock of the constituent companies; such shareholders, in lieu of their shares in those companies, to receive, upon an agreed basis of value, shares in the holding corporation; that pursuant to such combination the Northern Securities Company was organized as the holding corporation through which the scheme should be executed; and under that scheme such holding corporation has become the holder—more properly speaking, the custodian—of more than nine tenths of the stock of the Northern Pacific, and more than three fourths of the stock of the Great Northern, the stockholders of the companies who delivered their stock receiving upon the agreed basis shares of stock in the holding corporation. The stockholders of these two competing companies disappeared, as such, for the moment, but immediately reappeared as stockholders of the holding company, which was thereafter to guard the interests of both sets of stockholders as a unit, and to manage, or cause to be managed, both lines of railroad as if held in *one ownership*. Necessarily by this combination or arrangement the holding company in the fullest sense dominates the situation in the interest of those who were stockholders of the constituent companies; as much so, for every practical purpose, as if it had been itself a railroad corporation which had built, owned, and operated both lines for the exclusive benefit of its stockholders. Necessarily, also, the constituent companies ceased, under such a combination, to be in active competition for trade and commerce along their respective lines, and have become, practically, one powerful consolidated corporation, by the name of a holding corporation, the principal, if not the sole, object for the formation of which was to carry out the purpose of the original combination, under which competition between the constituent companies would cease. Those who were stockholders of the Great Northern and Northern Pacific and became stockholders in the holding company are now interested in preventing all competition between the two lines, and, as owners of stock or of certificates of stock in the holding company, they will see to it that no competition is tolerated. They will take care that no persons are chosen directors of

the holding company who will permit competition between the constituent companies. The result of the combination is that all the earnings of the constituent companies make a common fund in the hands of the Northern Securities Company, to be distributed, not upon the basis of the earnings of the respective constituent companies, each acting exclusively in its own interests, but upon the basis of the certificates of stock issued by the holding company. No scheme or device could more certainly come within the words of the act,—“combination in the form of a trust or otherwise . . . in restraint of commerce among the several states or with foreign nations,”—or could more effectively and certainly suppress free competition between the constituent companies. This combination is, within the meaning of the act, a “trust;” but if not, it is a *combination in restraint of interstate and international commerce*; and that is enough to bring it under the condemnation of the act. The mere existence of such a combination, and the power acquired by the holding company as its trustee, constitute a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect, and which the public is entitled to have protected. If such combination be not destroyed, all the advantages that would naturally come to the public under the operation of the general laws of competition, as between the Great Northern and Northern Pacific Railway Companies, will be lost, and the entire commerce of the immense territory in the northern part of the United States between the Great Lakes and the Pacific at Puget sound will be at the mercy of a single holding corporation, organized in a state distant from the people of that territory.

The circuit court was undoubtedly right when it said—all the judges of that court concurring—that the combination referred to “led inevitably to the following results: First, it placed the control of the two roads in the hands of a single person, to wit, the Securities Company, by virtue of its ownership of a large majority of the stock of both companies; second, it destroys every motive for competition between two roads engaged in interstate traffic, which were natural competitors for business, by pooling the earnings of the two roads

for the common benefit of the stockholders of both companies." 120 Fed. 721, 724.

Such being the case made by the record, what are the principles that must control the decision of the present case? Do former adjudications determine the controlling questions raised by the pleadings and proofs?

The contention of the government is that, if regard be had to former adjudications, the present case must be determined in its favor. That view is contested and the defendants insist that a decision in their favor will not be inconsistent with anything heretofore decided and would be in harmony with the act of Congress.

Is the act to be construed as forbidding every combination or conspiracy in restraint of trade or commerce among the states or with foreign nations? Or, does it embrace only such restraints as are unreasonable in their nature? Is the motive with which a forbidden combination or conspiracy was formed at all material when it appears that the necessary tendency of the particular combination or conspiracy in question is to restrict or suppress free competition between competing railroads engaged in commerce among the states? Does the act of Congress prescribe, as a *rule* for *interstate* or *international* commerce, that the operation of the natural laws of competition between those engaged in *such* commerce shall not be restricted or interfered with by any contract, combination, or conspiracy? How far may Congress go in regulating the affairs or conduct of state corporations engaged as carriers in commerce among the states or of state corporations which, although not directly engaged themselves in *such* commerce, yet have control of the business of interstate carriers? If state corporations, or their stockholders, are found to be parties to a combination in the form of a trust or otherwise, which restrains interstate or international commerce, may they not be compelled to respect any rule for such commerce that may be lawfully prescribed by Congress?

These questions were earnestly discussed at the bar by able counsel, and have received the full consideration which their importance demands.

The first case in this court arising under the anti-trust act was *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed.

325. The next case was that of *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007. That was followed by *United States v. Joint Traffic Asso.* 171 U. S. 505, 569, 571, 43 L. ed. 259, 287, 288; *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290; *Anderson v. United States*, 171 U. S. 604, 43 L. ed. 300; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, and *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, *ante*, p. 307. To these may be added *Pearsall v. Great N. R. Co.* 161 U. S. 646, 40 L. ed. 838, which, although not arising under the anti-trust act, involved an agreement under which the Great Northern and Northern Pacific Railway Companies should be consolidated and by which competition between those companies was to cease. In *United States v. E. C. Knight Co.* it was held that the agreement or arrangement there involved had reference only to the *manufacture* or *production* of sugar by those engaged in the alleged combination; but if it had directly embraced interstate or international commerce, it would then have been covered by the anti-trust act and would have been illegal; in *United States v. Trans-Missouri Freight Asso.* that an agreement between certain railroad companies providing for establishing and maintaining, for their mutual protection, reasonable rates, rules, and regulations in respect of freight traffic, through and local, and by which free competition among those companies was restricted, was, by reason of such restriction, illegal under the anti-trust act; in *United States v. Joint Traffic Asso.* that an arrangement between certain railroad companies in reference to railroad traffic among the states, by which the railroads involved were not subjected to competition among themselves, was also forbidden by the act; in *Hopkins v. United States* and *Anderson v. United States*, that the act embraced only agreements that had direct connection with interstate commerce, and that such commerce comprehended intercourse for all the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between citizens of different states, and the power to regulate it embraced all the instrumentalities by which such commerce is conducted; in *Addyston Pipe & Steel Co. v. United States*, all the members of the court concurring, that the act of Congress made illegal an agreement between certain private com-

panies or corporations engaged in different states in the manufacture, sale, and transportation of iron pipe, whereby competition among them was avoided; and in *W. W. Montague & Co. v. Lowry*, all the members of the court again concurring, that a combination created by an agreement between certain private manufacturers and dealers in tiles, grates, and mantels, in different states, whereby they controlled or sought to control the price of such articles in those states, was condemned by the act of Congress. In *Pearsall v. Great Northern R. Co.* which, as already stated, involved the consolidation of the Great Northern and Northern Pacific Railway Companies, the court said: "The consolidation of these two great corporations will unavoidably result in giving to the defendant [the Great Northern] a monopoly of all traffic in the northern half of the state of Minnesota, as well as of all transeontinental traffic north of the line of the Union Pacific, against which public regulations will be but a feeble protection. The acts of the Minnesota legislature of 1874 and 1881 undoubtedly reflected the general sentiment of the public,—that their best security is in competition."

We will not encumber this opinion by extended extracts from the former opinions of this court. It is sufficient to say that from the decisions in the above cases certain propositions are plainly deducible and embrace the present case. Those propositions are:

That although the act of Congress known as the anti-trust act has no reference to the mere manufacture or production of articles or commodities within the limits of the several states, it does embrace and declare to be illegal every contract, combination, or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates *in restraint of trade or commerce among the several states or with foreign nations*;

That the act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but embraces *all direct restraints* imposed by any combination, conspiracy or monopoly upon such trade or commerce;

That railroad carriers engaged in interstate or international trade or commerce are embraced by the act;

That combinations, even among private manufacturers or dealers, whereby *interstate or international commerce* is restrained, are equally embraced by the act;

That Congress has the power to establish *rules* by which *interstate and international commerce* shall be governed, and, by the anti-trust act, has prescribed the rule of free competition among those engaged in such commerce;

That *every* combination or conspiracy which would extinguish competition between otherwise competing railroads engaged in *interstate trade or commerce*, and which would *in that way* restrain such trade or commerce, is made illegal by the act;

That the natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promoting trade and commerce;

That to vitiate a combination such as the act of Congress condemns, it need not be shown that the combination, in fact, results or will result, in a total suppression of trade or in a complete monopoly, but it is only essential to show that, by its necessary operation, it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition;

That the constitutional guaranty of liberty of contract does not prevent Congress from prescribing the rule of free competition for those engaged in *interstate and international commerce*; and,

That under its power to regulate commerce among the several states and with foreign nations, Congress had authority to enact the statute in question.

No one, we assume, will deny that these propositions were distinctly announced in the former decisions of this court. They cannot be ignored or their effect avoided by the intimation that the court indulged in *obiter dicta*. What was said in those cases was within the limits of the issues made by the parties. In our opinion, the recognition of the principles announced in former cases must, under the conceded facts, lead to an affirmance of the decree below, unless the special objections, or some of them, which have been made to the applica-

tion of the act of Congress to the present case, are of a substantial character. We will now consider those objections.

Underlying the argument in behalf of the defendants is the idea that, as the Northern Securities Company is a state corporation, and as its acquisition of the stock of the Great Northern and Northern Pacific Railway Companies is not inconsistent with the powers conferred by its charter, the enforcement of the act of Congress, as against those corporations, will be an unauthorized interference by the national government with the internal commerce of the states creating those corporations. This suggestion does not at all impress us. There is no reason to suppose that Congress had any purpose to interfere with the internal affairs of the states, nor, in our opinion, is there any ground whatever for the contention that the anti-trust act regulates their domestic commerce. By its very terms the act regulates only commerce among the states and with foreign states. Viewed in that light, the act, if within the powers of Congress, must be respected; for, by the explicit words of the Constitution, that instrument and the laws enacted by Congress in pursuance of its provisions, are the supreme law of the land, "anything in the constitution or laws of any state to the contrary notwithstanding,"—supreme over the states, over the courts, and even over the people of the United States,—the source of all power under our governmental system in respect of the objects for which the national government was ordained. An act of Congress constitutionally passed under its power to regulate commerce among the states and with foreign nations is binding upon all; as much so as if it were embodied, in terms, in the Constitution itself. Every judicial officer, whether of a national or a state court, is under the obligations of an oath so to regard a lawful enactment of Congress. Not even a state, still less one of its artificial creatures, can stand in the way of its enforcement. If it were otherwise, the government and its laws might be prostrated at the feet of local authority. *Cohen v. Virginia*, 6 Wheat. 264, 385, 414, 5 L. ed. 257, 286, 293. These views have been often expressed by this court.

It is said that whatever may be the power of a state over such subjects, Congress cannot forbid single individuals from disposing of their stock in a state corporation, even if such

corporation be engaged in interstate and international commerce; that the holding or purchase by a state corporation, or the purchase by individuals, of the stock of another corporation, for whatever purpose, are matters in respect of which Congress has no authority under the Constitution; that, so far as the power of Congress is concerned, citizens, or state corporations, may dispose of their property and invest their money in any way they choose; and that in regard to all such matters, citizens and state corporations are subject, if to any authority, only to the lawful authority of the state in which such citizens reside or under whose laws such corporations are organized. It is unnecessary in this case to consider such abstract, general questions. The court need not now concern itself with them. They are not here to be examined and determined, and may well be left for consideration in some case necessarily involving their determination.

In this connection, it is suggested that the contention of the government is that the acquisition and *ownership* of stock in a state railroad corporation is itself interstate commerce if that corporation be engaged in interstate commerce. This suggestion is made in different ways; sometimes in express words, at other times by implication. For instance, it is said that the question here is whether the power of Congress over interstate commerce extends to the regulation of the ownership of the stock in state railroad companies, by reason of their being engaged in such commerce. Again, it is said that the only issue in this case is whether the Northern Securities Company can acquire and hold stock in other state corporations. Still further, it is asked, generally, whether the organization or ownership of railroads is not under the control of the states under whose laws they came into existence? Such statements as to the issues in this case are, we think, wholly unwarranted, and are very wide of the mark; it is the setting up of mere men of straw to be easily stricken down. We do not understand that the government makes any such contentions or takes any such positions as those statements imply. It does not contend that Congress may control the mere acquisition or the mere ownership of stock in a state corporation engaged in interstate commerce. Nor does it contend that Congress can control the organization of state corporations

authorized by their charters to engage in interstate and international commerce. But it does contend that Congress may protect the freedom of interstate commerce by any means that are appropriate and that are lawful, and not prohibited by the Constitution. It does contend that no state corporation can stand in the way of the enforcement of the national will, legally expressed. What the government particularly complains of—indeed, all that it complains of here—is the existence of a combination among the stockholders of competing railroad companies which, in violation of the act of Congress, restrains interstate and international commerce through the agency of a common corporate trustee, designated to act for both companies in repressing free competition between them. Independently of any question of the mere ownership of stock or of the organization of a state corporation, can it in reason be said that such a combination is not embraced by the very terms of the anti-trust act? May not Congress declare that *combination* to be illegal? If Congress legislates for the protection of the public, may it not proceed on the ground that wrongs, when effected by a powerful combination, are more dangerous and require more stringent supervision than when they are to be effected by a single person? *Callan v. Wilson*, 127 U. S. 540, 556, 32 L. ed. 223, 228. How far may the courts go in order to give effect to the act of Congress, and remedy the evils it was designed by that act to suppress? These are confessedly questions of great moment, and they will now be considered.

By the express words of the Constitution, Congress has power to “regulate commerce with foreign nations and among the several states, and with the Indian tribes.” In view of the numerous decisions of this court there ought not, at this day, to be any doubt as to the general scope of such power. In some circumstances regulation may properly take the form and have the effect of prohibition. *Re Rahrer*, 140 U. S. 545, 35 L. ed. 572; *Lottery Case*, 188 U. S. 321, 355, 47 L. ed. 492, 500, and *authorities there cited*. Again and again this court has reaffirmed the doctrine announced in the great judgment rendered by Chief Justice MARSHALL for the court in *Gibbons v. Ogden*, 9 Wheat. 1, 196, 197, 6 L. ed. 23, 70, that the power of Congress to regulate commerce among the states and with

foreign nations is the power "to prescribe the rule, by which commerce is to be governed;" that such power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution;" that "if, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several states is vested in Congress *as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States*;" that a sound construction of the Constitution allows to Congress a large discretion "with respect to the means by which the powers it confers are to be carried into execution, which enable that body to perform the high duties assigned to it, in the manner most beneficial to the people;" and that if the end to be accomplished is within the scope of the Constitution, "all means which are appropriate, which are plainly adapted to that end, and which are not prohibited, are constitutional." *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Sinnot v. Davenport*, 22 How. 227, 238, 16 L. ed. 243, 246; *Henderson v. Wickham*, 92 U. S. 259, 23 L. ed. 543; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 472, 24 L. ed. 527, 530; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 626, 42 L. ed. 878, 882; *Lottery Case*, 188 U. S. 321, 348, 47 L. ed. 492, 498. In *Cohen v. Virginia*, 6 Wheat. 264, 413, 5 L. ed. 257, 293, this court said that the United States were, for many important purposes, "a single nation," and that "in all commercial regulations we are one and the same people;" and it has since frequently declared that commerce among the several states was a *unit*, and subject to national control. Previously, in *M'Culloch v. Maryland*, 4 Wheat. 316, 405, 4 L. ed. 579, 601, the court had said that the government ordained and established by the Constitution was, within the limits of the powers granted to it, "the government of all; its powers are delegated by all; it represents all, and acts for all," and was "supreme within its sphere of action." As late as the case of *Re Debs*, 158 U. S. 564, 582, 39 L. ed. 1092, 1101, this court, every member of it concurring, said: "The entire strength of the nation

may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights intrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the nation, and all its militia, are at the service of the nation to compel obedience to its laws."

The means employed in respect of the combinations forbidden by the anti-trust act, and which Congress deemed germane to the end to be accomplished, was to prescribe as *a rule* for *interstate and international* commerce (not for domestic commerce) that it should not be vexed by combinations, conspiracies, or monopolies which restrain commerce by destroying or restricting competition. We say that Congress has prescribed such a rule, because, in all the prior cases in this court, the anti-trust act has been construed as forbidding any combination which, by its necessary operation, destroys or restricts free competition among those engaged in interstate commerce; in other words, that to destroy or restrict free competition in interstate commerce was to restrain such commerce. Now, can this court say that such a rule is prohibited by the Constitution or is not one that Congress could appropriately prescribe when exerting its power under the commerce clause of the Constitution? Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine. Undoubtedly, there are those who think that the general business interests and prosperity of the country will be best promoted if the rule of competition is not applied. But there are others who believe that such a rule is more necessary in these days of enormous wealth than it ever was in any former period of our history. Be all this as it may, Congress has, in effect, recognized the rule of free competition by declaring illegal every combination or conspiracy in restraint of interstate and international commerce. As, in the judgment of Congress, the public convenience and the general welfare will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce, and as Congress has embodied that rule in a statute,

that must be, for all, the end of the matter, if this is to remain a government of laws, and not of men.

It is said that railroad corporations created under the laws of a state can only be consolidated with the authority of the state. Why that suggestion is made in this case we cannot understand, for there is no pretense that the combination here in question was under the authority of the states under whose laws these railroad corporations were created. But even if the state allowed consolidation, it would not follow that the stockholders of two or more state railroad corporations, having *competing lines and engaged in interstate commerce*, could lawfully combine and form a distinct corporation to hold the stock of the constituent corporations, and, by destroying competition between them, in violation of the act of Congress, restrain commerce among the states and with foreign nations.

The rule of competition, prescribed by Congress, was not at all new in trade and commerce. And we cannot be in any doubt as to the reason that moved Congress to the incorporation of that rule into a statute. That reason was thus stated in *United States v. Joint Traffic Assn.*: "Has not Congress, with regard to interstate commerce, and in the course of regulating it, in the case of railroad corporations, the power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition? We think it has.

. . . It is the combination of these large and powerful corporations, covering vast sections of territory and influencing trade throughout the whole extent thereof, and acting *as one body* in all the matters over which the combination extends, that constitutes the alleged evil, and in regard to which, *so far as the combination operates upon and restrains interstate commerce*, Congress has power to legislate and to prohibit." pp. 569, 571, L. ed. pp. 237, 238, Sup. Ct. Rep. p. 32. That such a rule was applied to interstate commerce should not have surprised anyone. Indeed, when Congress declared contracts, combinations, and conspiracies in restraint of trade or commerce to be illegal, it did nothing more than apply to interstate commerce a rule that had been long applied by the several states when dealing with combinations that were in restraint of their domestic commerce. The decisions in state

courts upon this general subject are not only numerous and instructive, but they show the circumstances under which the anti-trust act was passed. It may well be assumed that Congress, when enacting that statute, shared the general apprehension that a few powerful corporations or combinations sought to obtain, and, unless restrained, would obtain, such absolute control of the entire trade and commerce of the country as would be detrimental to the general welfare.

In *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 186, the supreme court of Pennsylvania dealt with a combination of coal companies seeking the control, within a large territory, of the entire market for bituminous coal. The court, observing that the combination was wide in its scope, general in its influence, and injurious in its effects, said: "When competition is left free, individual error or folly will generally find a correction in the conduct of others. But here is a combination of all the companies operating in the Blossburg and Barclay mining regions, and controlling their entire productions. They have combined together to govern the supply and the price of coal in all the markets from the Hudson to the Mississippi rivers, and from Pennsylvania to the Lakes. This combination has a power in its confederated form which no individual action can confer. The public interest must succumb to it, for it has left no competition free to correct its baleful influence. When the supply of coal is suspended the demand for it becomes importunate, and prices must rise. Or if the supply goes forward, the price fixed by the confederates must accompany it. The domestic hearth, the furnaces of the iron master, and the fires of the manufacturer all feel the restraint, while many dependent hands are paralyzed and hungry mouths are stinted. The influence of a lack of supply or a rise in the price of an article of such prime necessity cannot be measured. It permeates the entire mass of the community, and leaves few of its members untouched by its withering blight. Such a combination is more than a contract; it is an offense. . . . In all such combinations where the purpose is injurious or unlawful, the gist of the offense is the conspiracy. Men can often do by the *combination* of many what, severally, no one could accomplish, and even what, when done by one, would be innocent. . . . *There is a potency in numbers when*

combined which the law cannot overlook, where injury is the consequence." The same principles were applied in *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558, 565, 23 Am. Rep. 190, 194, which was the case of a combination of two coal companies in order to give one of them a monopoly of coal in a particular region, the court of appeals of New York holding that "a combination to effect such a purpose is inimical to the interests of the public, and that all contracts designed to effect such an end are contrary to public policy, and therefore illegal." They were also applied by the supreme court of Ohio in *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666, 672, which was the case of a combination among manufacturers of salt in a large salt-producing territory, the court saying: "It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. *Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public.*"

So, in *Craft v. McConoughy*, 79 Ill. 346, 350, 22 Am. Rep. 171, 174, which was the case of a combination among grain dealers by which competition was stifled, the court saying: "So long as competition was free, the interest of the public was safe. The laws of trade, in connection with the rigor of competition, was all the guaranty the public required; but the secret combination created by the contract destroyed all competition, and created a monopoly against which the public interest had no protection." Again, in *People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 269, 297, 8 L. R. A. 497, 506, which involved the validity of the organization of a gas corporation which obtained a monopoly in the business of furnishing illuminating gas in the city of Chicago by buying the stock of four other gas companies, it was said: "Of what avail is it that any number of gas companies, may be formed under the general incorporation law, if a giant trust company can be clothed with the power of buying up and holding the stock and property of such companies, and, through the control thereby attained, can direct all their operations and weld them into one huge combination?" To the same effect are cases almost too numerous to be cited. But among them we

refer to *Richardson v. Buhl*, 77 Mich. 632, 6 L. R. A. 457, which was the case of the organization of a corporation in Connecticut to unite in one corporation all the match manufacturers in the United States, and thus to obtain control of the business of manufacturing matches; *Santa Clara Valley Mill & Lumber Co. v. Hayes*, 76 Cal. 387, 390, which was the case of a combination among manufacturers of lumber, by which it could control the business in certain localities; and *India Bagging Asso. v. Koek*, 14 La. Ann. 164, which was the case of a combination among various commercial firms to control the prices of bagging used by cotton planters.

The cases just cited, it is true, relate to the domestic commerce of the states. But they serve to show the authority which the states possess to guard the public against *combinations* that repress individual enterprise and interfere with the operation of the natural laws of competition among those engaged in trade within its limits. They serve also to give point to the declaration of this court in *Gibbons v. Ogden*, 9 Wheat. 197, 6 L. ed. 70,—a principle never modified by any subsequent decision,—that, subject to the limitations imposed by the Constitution upon the exercise of the powers granted by that instrument, “the power over commerce with foreign nations and among the several states is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States.” Is there, then any escape from the conclusion that, subject only to such restrictions, the power of Congress over interstate and international commerce is as full and complete as is the power of any state over its domestic commerce? If a state may strike down combinations that restrain its domestic commerce by destroying free competition among those engaged in such commerce, what power, except that of Congress, is competent to protect the freedom of interstate and international commerce when assailed by a combination that restrains such commerce by stifling competition among those engaged in it?

Now, the court is asked to adjudge that, if held to embrace the case before us, the anti-trust act is repugnant to the Constitution of the United States. In this view we are unable to concur. The contention of the defendants could not be

sustained without, in effect, overruling the prior decisions of this court as to the scope and validity of the anti-trust act. If, as the court has held, Congress can strike down a combination between private persons or private corporations that restrains trade among the states in iron pipe (as in *Addyston Pipe & Steel Co. v. United States*) or in tiles, grates, and mantels (as in *W. W. Montague & Co. v. Lowry*), surely it ought not to be doubted that Congress has power to declare illegal a combination that restrains commerce among the states, and with foreign nations, as carried on over the lines of competing railroad companies exercising public franchises, and engaged in such commerce. We cannot agree that Congress may strike down combinations among manufacturers and dealers in iron pipe, tiles, grates, and mantels that restrain commerce among the states in such articles, but may not strike down combinations among stockholders of competing railroad carriers, which restrain commerce as involved in the transportation of passengers and property among the several states. If private parties may not, by combination among themselves, restrain interstate and international commerce in violation of an act of Congress, much less can such restraint be tolerated when imposed or attempted to be imposed, upon commerce as carried on over public highways. Indeed, if the contentions of the defendants are sound, why may not *all* the railway companies in the United States, that are engaged, under state charters, in interstate and international commerce, enter into a combination such as the one here in question, and, by the device of a holding corporation, obtain the absolute control throughout the entire country of rates for passengers and freight, beyond the power of Congress to protect the public against their exactions? The argument in behalf of the defendants necessarily leads to such results, and places Congress, although invested by the people of the United States with full authority to regulate interstate and international commerce, in a condition of utter helplessness, so far as the protection of the public against such combinations is concerned.

Will it be said that Congress can meet such emergencies by prescribing the rates by which interstate carriers shall be governed in the transportation of freight and passengers? If Congress has the power to fix such rates—and upon that ques-

tion we express no opinion—it does not choose to exercise its power in that way or to that extent. It has, all will agree, a large discretion as to the means to be employed in the exercise of any power granted to it. For the present, it has determined to go no farther than to protect the freedom of commerce among the states and with foreign states by declaring illegal all contracts, combinations, conspiracies, or monopolies in restraint of such commerce, and make it a public offense to violate the rule thus prescribed. How much further it may go, we do not now say. We need only at this time consider whether it has exceeded its powers in enacting the statute here in question.

Assuming, without further discussion, that the case before us is within the terms of the act, and that the act is not in excess of the powers of Congress, we recur to the question, How far may the courts go in reaching and suppressing the combination described in the bill? All will agree that if the anti-trust act be constitutional, and if the combination in question be in violation of its provisions, the courts may enforce the provisions of the statute by such orders and decrees as are necessary or appropriate to that end and as may be consistent with the fundamental rules of legal procedure. And all, we take it, will agree, as established firmly by the decisions of this court, that the power of Congress over commerce extends to all the instrumentalities of such commerce, and to every device that may be employed to interfere with the freedom of commerce among the states and with foreign nations. Equally, we assume, all will agree that the Constitution and the legal enactments of Congress are, by express words of the Constitution, the supreme law of the land, anything in the constitution and laws of any state to the contrary notwithstanding. Nevertheless, the defendants, strangely enough, invoke in their behalf the 10th Amendment of the Constitution, which declares that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people;” and we are confronted with the suggestion that any order or decree of the Federal court which will prevent the Northern Securities Company from exercising the power it acquired in becoming the holder of the stocks of the Great Northern and

Northern Pacific Railway Companies will be an invasion of the rights of the state under which the Securities Company was chartered, as well as of the rights of the states creating the other companies. In other words, if the state of New Jersey gives a charter to a corporation, and even if the obtaining of such charter is in fact pursuant to a *combination* under which it becomes the holder of the stocks of shareholders in two competing, parallel railroad companies engaged in interstate commerce in other states, whereby competition between the respective roads of those companies is to be destroyed and the enormous commerce carried on over them restrained by suppressing competition, Congress must stay its hands and allow such restraint to continue, to the detriment of the public, because, forsooth, the corporations concerned or some of them are state corporations. We cannot conceive how it is possible for anyone to seriously contend for such a proposition. It means nothing less than that Congress, in regulating interstate commerce, must act in subordination to the will of the states when exerting their power to create corporations. No such view can be entertained for a moment.

It is proper to say in passing that nothing in the record tends to show that the state of New Jersey had any reason to suspect that those who took advantage of its liberal incorporation laws had in view, when organizing the Securities Company, to destroy competition between two great railway carriers engaged in interstate commerce in distant states of the Union. The purpose of the combination was concealed under very general words that gave no clue whatever to the real purposes of those who brought about the organization of the Securities Company. If the certificate of incorporation of that company had expressly stated that the object of the company was to destroy competition between competing, parallel lines of interstate carriers, all would have seen, at the outset, that the scheme was in hostility to the national authority, and that there was a purpose to violate or evade the act of Congress.

We reject any such view of the relations of the national government and the states composing the Union as that for which the defendants contend. Such a view cannot be maintained without destroying the just authority of the United States. It is inconsistent with all the decisions of this court

as to the powers of the national government over matters committed to it. No state can, by merely creating a corporation, or in any other mode, project its authority into other states, and across the continent, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce, or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce. It cannot be said that any state may give a corporation, created under its laws, authority to restrain interstate or international commerce against the will of the nation as lawfully expressed by Congress. Every corporation created by a state is necessarily subject to the supreme law of the land. And yet the suggestion is made that to restrain a state corporation from interfering with the free course of trade and commerce among the states, in violation of an act of Congress, is hostile to the reserved rights of the states. The Federal court may not have power to forfeit the charter of the Securities Company; it may not declare how its shares of stock may be transferred on its books, nor prohibit it from acquiring real estate, nor diminish or increase, its capital stock. All these and like matters are to be regulated by the state which created the company. But to the end that effect be given to the national will, lawfully expressed, Congress may prevent that company, in its capacity as a holding corporation and trustee, from carrying out the purposes of a combination formed in restraint of interstate commerce. The Securities Company is itself a part of the present combination; its head and front; its trustee. It would be extraordinary if the court, in executing the act of Congress, could not lay hands upon that company and prevent it from doing that which, if done, will defeat the act of Congress. Upon like grounds the court can, by appropriate orders, prevent the two competing railroad companies here involved from co-operating with the Securities Company in restraining commerce among the states. In short, the court may make any order necessary to bring about the dissolution or suppression of an illegal combination that restrains interstate commerce. All this can be done without infringing in any degree upon the just authority of the states. The affirmance of the judgment below will only mean

that no combination, however powerful, is stronger than the law, or will be permitted to avail itself of the pretext that to prevent it doing that which, if done, would defeat a legal enactment of Congress, is to attack the reserved rights of the states. It would mean that the government which represents all, can, when acting within the limits of its powers, compel obedience to its authority. It would mean that no device in evasion of its provisions, however skilfully such device may have been contrived, and no combination, by whomsoever formed, is beyond the reach of the supreme law of the land, if such device or combination, by its operation, directly restrains commerce among the states or with foreign nations in violation of the act of Congress.

The defendants rely, with some confidence, upon the case of the *Baltimore & O. R. Co. v. Maryland*, 21 Wall. 456, 473, 22 L. ed. 678, 684. But nothing we have said is inconsistent with any principle announced in that case. The court there recognized the principle that a state has plenary powers "over its own territory, its highways, its franchises, and its corporations," and observed that "we are bound to sustain the constitutional powers and prerogatives of the states, as well as those of the United States, whenever they are brought before us for adjudication, no matter what may be the consequences." Of course, every state has, in a general sense, plenary power over its corporations. But is it conceivable that a state, when exerting power over a corporation of its creation, may prevent or embarrass the exercise by Congress of any power with which it is invested by the Constitution? In the case just referred to the court does not say, and it is not to be supposed that it will ever say, that any power exists in a state to prevent the enforcement of a lawful enactment of Congress, or to invest any of its corporations, in whatever business engaged, with authority to disregard such enactment or defeat its legitimate operation. On the contrary, the court has steadily held to the doctrine, vital to the United States as well as to the states, that a state enactment, even if passed in the exercise of its acknowledged powers, must yield, in case of conflict, to the supremacy of the Constitution of the United States and the acts of Congress enacted in pursuance of its provisions. This results, the court has said, as well from the nature of the

government as from the words of the Constitution. *Gibbons v. Ogden*, 9 Wheat. 1, 210, 6 L. ed. 23, 73; *Sinnot v. Davenport*, 22 How. 227, 243, 16 L. ed. 243, 247; *Re Debs*, 158 U. S. 564, 39 L. ed. 1092; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 626, 627, 42 L. ed. 878, 883. In *Texas v. White*, 7 Wall. 700, 725, 19 L. ed. 227, 237, the court remarked "that 'the people of each state compose a state, having its own government, and endowed with all the functions essential to separate and independent existence,' and that 'without the states in union, there could be no such political body as the United States.' *Lane County v. Oregon*, 7 Wall. 76, 19 L. ed. 104. Not only, therefore, can there be no loss of separate and independent autonomy to the states, through their union under the Constitution, but it may be not unreasonably said that the preservation of the states, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government." These doctrines are at the basis of our constitutional government, and cannot be disregarded with safety.

The defendants also rely on *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 702, 40 L. ed. 849, 859. In that case it was contended by the railroad company that the assumption of the state to forbid the consolidation of parallel and competing lines was an interference with the power of Congress over interstate commerce. The court observed that but little need be said in answer to such proposition, for "it has never been supposed that the dominant power of Congress over interstate commerce took from the states the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers." But that case distinctly recognized that there was a division of power between Congress and the states in respect to interstate railways, and that Congress had the superior right to control that commerce and forbid interference therewith, while to the states remained the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests. If there is anything in that case which even intimates that a state or a state corporation may in any way directly restrain interstate commerce, over

which Congress has, by the Constitution, complete control, we have been unable to find it.

The question of the relations of the general government with the states is again presented by the specific contention of each defendant that Congress did not intend "to limit the power of the several states to create corporations, define their purposes, fix the amount of their capital, and determine who may buy, own, and sell their stock." All that is true, generally speaking, but the contention falls far short of meeting the controlling questions in this case. To meet this contention we must repeat some things already said in this opinion. But if what we have said be sound, repetition will do no harm. So far as the Constitution of the United States is concerned, a state may, indeed, create a corporation, define its powers, prescribe the amount of its stock and the mode in which it may be transferred. It may even authorize one of its corporations to engage in commerce of every kind,—domestic, interstate, and international. The regulation or control of purely domestic commerce of a state is, of course, with the state, and Congress has no direct power over it so long as what is done by the state does not interfere with the operations of the general government, or any legal enactment of Congress. A state, if it chooses so to do, may even submit to the existence of combinations within its limits that restrain its internal trade. But neither a state corporation nor its stockholders can, by reason of the nonaction of the state or by means of any combination among such stockholders, interfere with the complete enforcement of any rule lawfully devised by Congress for the conduct of commerce among the states or with foreign nations; for, as we have seen, interstate and international commerce is, by the Constitution, under the control of Congress, and it belongs to the legislative department of the government to prescribe rules for the conduct of that commerce. If it were otherwise, the declaration in the Constitution of its supremacy, and of the supremacy as well of the laws made in pursuance of its provisions, was a waste of words. Whilst every instrumentality of domestic commerce is subject to state control, every instrumentality of interstate commerce may be reached and controlled by national authority, *so far as to compel it to respect the rules for such commerce lawfully established by*

Congress. No corporate person can excuse a departure from or violation of that rule under the plea that that which it has done or omitted to do is permitted, or not forbidden, by the state under whose authority it came into existence. We repeat that no state can endow any of its corporations, or any combination of its citizens, with authority to restrain interstate or international commerce, or to disobey the national will as manifested in legal enactments of Congress. So long as Congress keeps within the limits of its authority as defined by the Constitution, infringing no rights recognized or secured by that instrument, its regulations of interstate and international commerce, whether founded in wisdom or not, must be submitted to by all. Harm, and only harm, can come from the failure of the courts to recognize this fundamental principle of constitutional construction. To depart from it because of the circumstances of special cases, or because the rule, in its operation, may possibly affect the interests of business, is to endanger the safety and integrity of our institutions and make the Constitution mean not what it says, but what interested parties wish it to mean at a particular time and under particular circumstances. The supremacy of the law is the foundation rock upon which our institutions rest. The law, this court said in *United States v. Lee*, 106 U. S. 196, 220, 27 L. ed. 171, 181, is the only supreme power in our system of government. And no higher duty rests upon this court than to enforce, by its decrees, the will of the legislative department of the government, as expressed in a statute, unless such statute be plainly and unmistakably in violation of the Constitution. If the statute is beyond the constitutional power of Congress, the court would fail in the performance of a solemn duty if it did not so declare. But if nothing more can be said than that Congress has erred,—and the court must not be understood as saying that it has or has not erred,—the remedy for the error and the attendant mischief is the selection of new senators and representatives, who, by legislation, will make such changes in existing statutes, or adopt such new statutes, as may be demanded by their constituents and be consistent with law.

Many suggestions were made in argument based upon the thought that the anti-trust act would, in the end, prove to be

mischievous in its consequences. Disaster to business and wide-spread financial ruin, it has been intimated, will follow the execution of its provisions. Such predictions were made in all the cases heretofore arising under that act. But they have not been verified. It is the history of monopolies in this country and in England that predictions of ruin are habitually made by them when it is attempted, by legislation, to restrain their operations and to protect the public against their exactions. In this, as in former cases, they seek shelter behind the reserved rights of the states and even behind the constitutional guaranty of liberty of contract. But this court has heretofore adjudged that the act of Congress did not touch the rights of the states, and that liberty of contract did not involve a right to deprive the public of the advantages of free competition in trade and commerce. Liberty of contract does not imply liberty in a corporation or individuals to defy the national will, when legally expressed. Nor does the enforcement of a legal enactment of Congress infringe, in any proper sense, the general inherent right of every one to acquire and hold property. That right, like all other rights, must be exercised in subordination to the law.

But even if the court shared the gloomy forebodings in which the defendants indulge, it could not refuse to respect the action of the legislative branch of the government if what it has done is within the limits of its constitutional power. The suggestions of disaster to business have, we apprehend, their origin in the zeal of parties who are opposed to the policy underlying the act of Congress or are interested in the result of this particular case; at any rate, the suggestions imply that the court may and ought to refuse the enforcement of the provisions of the act if, in its judgment, Congress was not wise in prescribing as a rule by which the conduct of interstate and international commerce is to be governed, that every combination, whatever its form, in restraint of such commerce and the monopolizing or attempting to monopolize such commerce, shall be illegal. These, plainly, are questions as to the policy of legislation which belong to another department, and this court has no function to supervise such legislation from the standpoint of wisdom or policy. We need only say that Congress has authority to declare, and by the language of its

act, as interpreted in prior cases, has, in effect, declared, that the freedom of interstate and international commerce shall not be obstructed or disturbed by any combination, conspiracy, or monopoly that will restrain such commerce by preventing the free operation of competition among interstate carriers engaged in the transportation of passengers and freight. This court cannot disregard that declaration unless Congress, in passing the statute in question, be held to have transgressed the limits prescribed for its action by the Constitution. But, as already indicated, it cannot be so held consistently with the provisions of that instrument.

The combination here in question may have been for the pecuniary benefit of those who formed or caused it to be formed. But the interests of private persons and corporations cannot be made paramount to the interests of the general public. Under the Articles of Confederation commerce among the original states was subject to vexatious and local regulations that took no account of the general welfare. But it was for the protection of the general interests, as involved in interstate and international commerce, that Congress, representing the whole country, was given by the Constitution full power to regulate commerce among the states and with foreign nations. In *Brown v. Maryland*, 12 Wheat. 419, 446, 6 L. ed. 678, 688, it was said: "Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress." Railroad companies, we said in the *Trans-Missouri Freight Asso. Case*, "are instruments of commerce and their business is commerce itself." And such companies, it must be remembered, operate "public highways, established primarily for the convenience of the people, and therefore are subject to governmental control and regulation." *Cherokee Nation v. Southern Kansas R. Co.* 135 U. S. 641, 657, 34 L. ed. 295, 302; *Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co.* 139 U. S. 79, 90, 35 L. ed. 97, 102; *Interstate*

Commerce Commission v. Brimson, 154 U. S. 447, 475, 38 L. ed. 1047, 1056, 4 Inters. Com. Rep. 545; United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 332, 41 L. ed. 1007, 1024; Smyth v. Ames, 169 U. S. 466, 544, 42 L. ed. 819, 848; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 301, 43 L. ed. 702, 708. When such carriers, in the exercise of public franchises, engage in the transportation of passengers and freight among the states, they become—even if they be state corporations—subject to such rules as Congress may lawfully establish for the conduct of interstate commerce.

It was said in argument that the circumstances under which the Northern Securities Company obtained the stock of the constituent companies imported simply an investment in the stock of other corporations,—a purchase of that stock; which investment or purchase, it is contended, was not forbidden by the charter of the company, and could not be made illegal by any act of Congress. This view is wholly fallacious, and does not comport with the actual transaction. There was no actual investment, in any substantial sense, by the Northern Securities Company in the stock of the two constituent companies. If it was, in form, such a transaction, it was not, in fact, one of that kind. However that company may have acquired for itself any stock in the Great Northern and Northern Pacific Railway Companies, no matter how it obtained the means to do so, all the stock it held or acquired in the constituent companies was acquired and held to be used in suppressing competition between those companies. It came into existence only for that purpose. If anyone had full knowledge of what was designed to be accomplished, and as to what was actually accomplished, by the combination in question, it was the defendant Morgan. In his testimony he was asked, “Why put the stocks of *both* these [constituent companies] into one holding company?” He frankly answered: “In the first place, this holding company was simply a question of *custodian*, because it had no other allies.” That disclosed the actual nature of the transaction, which was only to organize the Northern Securities Company as a *holding* company, in whose hands, not as a real purchaser or absolute owner, but simply as *custodian*, were to be placed the stocks of the constituent companies,—such custodian to represent the combination formed between the shareholders of

the constituent companies, the direct and necessary effect of such combination being, as already indicated, to restrain and monopolize interstate commerce by suppressing, or (to use the words of this court in *United States v. Joint Traffic Asso.*) "smothering" competition between the lines of two railway carriers.

We will now inquire as to the nature and extent of the relief granted to the government by the decree below.

By the decree in the circuit court it was found and adjudged that the defendants had entered into a combination or conspiracy in restraint of trade or commerce among the several states, such as the act of Congress denounced as illegal; and that all of the stocks of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company, claimed to be owned and held by the Northern Securities Company, was acquired, and is by it held, in virtue of such combination or conspiracy, in restraint of trade and commerce among the several states. It was therefore decreed as follows: "That the Northern Securities Company, its officers, agents, servants, and employees, be and they are hereby enjoined from acquiring, or attempting to acquire, further stock of either of the aforesaid railway companies; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from attempting to vote it, at any meeting of the stockholders of either of the aforesaid railway companies, and from exercising or attempting to exercise any control, direction, supervision, or influence whatsoever over the acts and doings of said railway companies, or either of them, by virtue of its holding such stock therein; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants, and agents, be and they are hereby respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf, by its attorneys or agents, at any corporate election for directors or officers of either of the aforesaid railway companies; that they, together with their officers, directors, servants, and agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies, which it now claims to own

and hold; and that the aforesaid railway companies, their officers, directors, servants, and agents, be enjoined from permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies. But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said The Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

Subsequently, and before the appeal to this court was perfected, an order was made in the circuit court to this effect: "That upon the giving of an approved bond to the United States by or on behalf of the defendants in the sum of \$50,000, conditioned to prosecute their appeal with effect and to pay all damages which may result to the United States from this order, that portion of the injunction contained in the final decree herein which forbids the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants, and agents, from paying dividends to the Northern Securities Company on account of stock in either of the railway companies which the Securities Company claims to own and hold, is suspended during the pendency of the appeal allowed herein this day. All other portions of the decree and of the injunction it contains remain in force and are unaffected by this order."

No valid objection can be made to the decree below, in form or in substance. If there was a combination or conspiracy in violation of the act of Congress, between the stockholders of the Great Northern and the Northern Pacific Railway Companies, whereby the Northern Securities Company was formed

as a holding corporation, and whereby interstate commerce over the lines of the constituent companies was restrained, it must follow that the court in execution of that act, and to defeat the efforts to evade it, could prohibit the parties to the combination from doing the specific things which, being done, would affect the result denounced by the act. To say that the court could not go so far is to say that it is powerless to enforce the act or to suppress the illegal combination, and powerless to protect the rights of the public as against that combination.

It is here suggested that the alleged combination had accomplished its object before the commencement of this suit, in that the Securities Company had then organized and had actually received a majority of the stock of the two constituent companies; *therefore*, it is argued, no effective relief can now be granted to the government. This same view was pressed upon the circuit court and was rejected. It was completely answered by that court when it said: "Concerning the second contention, we observe that it would be a novel, not to say absurd, interpretation of the anti-trust act to hold that after an unlawful combination is formed and has acquired the power which it had no right to acquire,—namely, to restrain commerce by suppressing competition,—and is proceeding to use it and execute the purpose for which the combination was formed, it must be left in possession of the power that it has acquired, with full freedom to exercise it. Obviously, the act when fairly interpreted, will bear no such construction. Congress aimed to destroy the power to place any direct restraint on interstate trade or commerce, when, by any combination or conspiracy, formed by either natural or artificial persons, such a power had been acquired; and the government may intervene and demand relief as well after the combination is fully organized as while it is in process of formation. In this instance, as we have already said, the Securities Company made itself a party to a combination in restraint of interstate commerce that antedated its organization, as soon as it came into existence; doing so, of course, under the direction of the very individuals who promoted it." The circuit court has done only what the actual situation demanded. Its decree has done nothing more than to meet the requirements of the statute. It could not have done less without declaring its impotency in dealing with those who

have violated the law. The decree, if executed, will destroy not the property interests of the original stockholders of the constituent companies, but the power of the holding corporation as the instrument of an illegal combination of which it was the master spirit, to do that which, if done, would restrain interstate and international commerce. The exercise of that power being restrained, the object of Congress will be accomplished; left undisturbed, the act in question will be valueless for any practical purpose.

It is said that this statute contains criminal provisions and must therefore be strictly construed. The rule upon that subject is a very ancient and salutary one. It means only that we must not bring cases within the provisions of such a statute that are not clearly embraced by it, nor by narrow, technical, or forced construction of words, exclude cases from it that are obviously within its provisions. What must be sought for always is the intention of the legislature, and the duty of the court is to give effect to that intention, as disclosed by the words used.

As early as the case of *King v. Hodnett*, 1 T. R. 96, 101, Mr. Justice BULLER said: "It is not true that the courts, in the exposition of penal statutes, are to narrow the construction." In *United States v. Wiltberger*, 5 Wheat. 76, 95, 5 L. ed. 37, 42, Chief Justice MARSHALL, delivering the judgment of this court and referring to the rule that penal statutes are to be construed strictly, said: "It is a modification of the ancient maxim, and amounts to this; that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptance, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction." In *United States v. Morris*, 14 Pet. 464, 475, 10 L. ed. 543, 548, this court, speaking by Chief Justice TANEY, said: "In expounding a penal statute the court certainly will not extend it beyond the plain meaning of its words; for it has been long and well settled that such statutes must be construed strictly. Yet the

evident intention of the legislature ought not to be defeated by a forced and overstrict construction. 5 Wheat. 95, 5 L. ed. 42." So, in *The Industry*, 1 Gall. 114, 117, Fed. Cas. No. 7,028, Mr. Justice Story said: "We are undoubtedly bound to construe penal statutes strictly, and not to extend them beyond their obvious meaning by strained inferences. On the other hand, we are bound to interpret them according to the manifest import of the words, and to hold all cases which are within the words and the mischiefs to be within the remedial influence of the statute." In another case the same eminent jurist said: "I agree to that rule in its true and sober sense; and that is, that penal statutes are not to be enlarged by implication or extended to cases not obviously within their words and purport. . . . In short, it appears to me that the proper course in all these cases is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature." *United States v. Winn*, 3 Sumn. 209, 211, 212, Fed. Cas. No. 16,740. In *People v. Bartow*, 6 Cow. 290, the highest court of New York said: "Although a penal statute is to be construed strictly, the court are not to disregard the plain intent of the legislature. . . . It is well settled that a statute which is made for the good of the public ought although it be penal, to receive an equitable construction." So, in *Com. v. Martin*, 17 Mass. 359, 362, the highest court of Massachusetts said: "If a statute creating or increasing a penalty be capable of two constructions, undoubtedly that construction which operates in favor of life or liberty is to be adopted; but it is not justifiable in this any more than in any other case, to imagine ambiguities merely that a lenient construction may be adopted. If such were the privilege of a court, it would be easy to obstruct the public will in almost every statute enacted; for it rarely happens that one is so precise and exact in its terms as to preclude the exercise of ingenuity in raising doubts about its construction." There are cases almost without number in this country and in England to the same effect.

Guided by these long-established rules of construction, it is manifest that if the anti-trust act is held not to embrace a case such as is now before us, the plain intention of the legislative

branch of the government will be defeated. If Congress has not, by the words used in the act, described this and like cases, it would, we apprehend, be impossible to find words that would describe them. This, it must be remembered, is a suit in equity, instituted by authority of Congress "to prevent and restrain violations of the act," § 4; and the court, in virtue of a well-settled rule governing proceedings in equity, may mould its decree so as to accomplish practical results,—such results as law and justice demand. The defendants have no just cause to complain of the decree, in matter of law, and it should be affirmed.

The judgment of the court is that the decree below be and hereby is affirmed, with liberty to the Circuit Court to proceed in the execution of its decree as the circumstances may require.
Affirmed.

MR. JUSTICE BREWER, concurring:

I cannot assent to all that is said in the opinion just announced, and believe that the importance of the case and the questions involved justify a brief statement of my views.

First, let me say that while I was with the majority of the court in the decision in *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, followed by the cases of *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, and *W. W. Montague & Co. v. Lowry* (decided at the present term) 193 U. S. 38, *ante*, 307, and while a further examination (which has been induced by the able and exhaustive arguments of counsel in the present case) has not disturbed the conviction that those cases were rightly decided, I think that in some respects the reasons given for the judgments cannot be sustained. Instead of holding that the anti-trust act included all contracts, reasonable or unreasonable, in restraint of interstate trade, the ruling should have been that the contracts there presented were unreasonable restraints of interstate trade, and as such within the scope of the act. That act, as appears from its title, was leveled at only "unlawful restraints and monopolies." Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed

were reasonable and ought to be upheld. The purpose rather was to place a statutory prohibition, with prescribed penalties and remedies, upon those contracts which were in direct restraint of trade, unreasonable, and against public policy. Whenever a departure from common-law rules and definitions is claimed, the purpose to make the departure should be clearly shown. Such a purpose does not appear, and such a departure was not intended.

Further, the general language of the act is also limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen. If, applying this thought to the present case, it appeared that Mr. Hill was the owner of a majority of the stock in the Great Northern Railway Company, he could not, by any act of Congress, be deprived of the right of investing his surplus means in the purchase of stock of the Northern Pacific Railway Company, although such purchase might tend to vest in him through that ownership a control over both companies. In other words, the right which all other citizens had, of purchasing Northern Pacific stock, could not be denied to him by Congress because of his ownership of stock in the Great Northern Company. Such was the ruling in *Pearsall v. Great Northern R. Co.* 161 U. S. 646, 40 L. ed. 838, in which this court said (p. 671, L. ed.), in reference to the right of the stockholders of the Great Northern Company to purchase the stock of the Northern Pacific Railway Company: "Doubtless these stockholders could lawfully acquire, by individual purchases, a majority or even the whole of the stock of the reorganized company, and thus possibly obtain its ultimate control; but the companies would still remain separate corporations, with no interests, as such, in common."

But no such investment by a single individual of his means is here presented. There was a combination by several individuals, separately owning stock in two competing railroad companies, to place the control of both in a single corporation. The purpose to combine, and by combination destroy competition, existed before the organization of the corporation, the Securities Company. That corporation, though nominally having a capital stock of \$400,000,000, had no means of its own;

\$30,000 in cash was put into its treasury, but simply for the expenses of organization. The organizers might just as well have made the nominal stock a thousand millions as four hundred, and the corporation would have been no richer or poorer. A corporation, while by fiction of law recognized for some purposes as a person, and, for purposes of jurisdiction, as a citizen, is not endowed with the inalienable rights of a natural person. It is an artificial person, created and existing only for the convenient transaction of business. In this case it was a mere instrumentality by which separate railroad properties were combined under one control. That combination is as direct a restraint of trade by destroying competition as the appointment of a committee to regulate rates. The prohibition of such a combination is not at all inconsistent with the right of an individual to purchase stock. The transfer of stock to the Securities Company was a mere incident, the manner in which the combination to destroy competition, and thus unlawfully restrain trade, was carried out.

If the parties interested in these two railroad companies can, through the instrumentality of a holding corporation, place both under one control, then in like manner, as was conceded on the argument by one of the counsel for the appellants, could the control of all the railroad companies in the country be placed in a single corporation. Nor need this arrangement for control stop with what has already been done. The holders of \$201,000,000 of stock in the Northern Securities Company might organize another corporation to hold their stock in that company, and the new corporation, holding the majority of the stock in the Northern Securities Company, and acting in obedience to the wishes of a majority of its stockholders, would control the action of the Securities Company and through it the action of the two railroad companies; and this process might be extended until a single corporation whose stock was owned by three or four parties would be in practical control of both roads; or, having before us the possibilities of combination, the control of the whole transportation system of the country. I cannot believe that to be a reasonable or lawful restraint of trade.

Again, there is by this suit no interference with state control. It is a recognition rather than a disregard of its action. This

merging of control and destruction of competition was not authorized, but specifically prohibited by the state which created one of the railroad companies, and within whose boundaries the lines of both were largely located and much of their business transacted. The purpose and policy of the state are therefore enforced by the decree. So far as the work of the two railroad companies was interstate commerce, it was subject to the control of Congress, and its purpose and policy were expressed in the act under which this suit was brought.

It must also be remembered that under present conditions a single railroad is, if not a legal, largely a practical, monopoly; and the arrangement by which the control of these two competing roads was merged in a single corporation broadens and extends such monopoly. I cannot look upon it as other than an unreasonable combination in restraint of interstate commerce,—one in conflict with state law, and within the letter and spirit of the statute and the power of Congress. Therefore I concur in the judgment of affirmance.

I have felt constrained to make these observations for fear that the broad and sweeping language of the opinion of the court might tend to unsettle legitimate business enterprises, stifle or retard wholesome business activities, encourage improper disregard of reasonable contracts, and invite unnecessary litigation.

MR. JUSTICE WHITE, with whom concur Mr. Chief Justice FULLER, Mr. Justice PECKHAM, and Mr. Justice HOLMES, dissenting:

The Northern Securities Company is a New Jersey corporation; the Great Northern Railway Company, a Minnesota one; and the Northern Pacific Railway Company, a Wisconsin corporation. Whilst in the argument at bar the government referred to the subject, nevertheless it expressly disclaimed predicated any claim for relief upon the fact that the predecessor in title of the Northern Pacific Railway Company was a corporation created by act of Congress. That fact, therefore, may be eliminated.

The facts essential to be borne in mind to understand my point of view, without going into details, are as follows: The lines of the Northern Pacific and the Great Northern Railway

Companies are both transeontinental, that is, trunk lines to the Pacific Ocean,—and in some aspects are conceded to be competing. Mr. Morgan and Mr. Hill and a few persons immediately associated with them separately acquired and owned capital stock of the Northern Pacific Railway Company, aggregating a majority thereof. Mr. Hill and others associated with him owned, in the same manner, about one-third of the capital stock of the Great Northern Railway Company, the balance of the stock being distributed among about eighteen hundred stockholders. Although Mr. Hill and his immediate associates owned only one-third of the stock, the confidence reposed in Mr. Hill was such that, through proxies, his influence was dominant in the affairs of that company. Under these circumstances Mr. Morgan and Mr. Hill organized under the laws of New Jersey the Northern Securities Company. The purpose was that the company should become the holder of the stock of the two railroads. This was to be effected by having the Northern Securities Company give its stock in exchange for that of the two railroad companies. Whilst the purpose of the promoters was mainly to exchange the stock held by them in the two railroads for the Northern Securities Company stock, nevertheless the right of stockholders generally in the two railroads to make a similar exchange or to sell their stock to the Securities Company was provided for. Under the arrangement the Northern Securities Company came to be the registered holder of a majority of the stock of both the railroads. It is not denied that the charter and the acts done under it, of the Northern Securities Company, were authorized by the laws of New Jersey, and, therefore, in so far as those laws were competent to sanction the transaction, the corporation held the stock in the two railroads secured by the law of the state of its domicile.

The government by its bill challenges the right of the Northern Securities Company to hold and own the stock in the two railroads. The grounds upon which the relief sought was based were, generally speaking, as follows: That, as the two railroads were competing lines engaged in part in interstate commerce, the creation of the Northern Securities Company and the acquisition by it of a majority of the stock of both roads was contrary to the act of Congress known as the anti-trust act. 26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200. The

clauses of the act which it was charged were violated were the 1st section, declaring illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations;" and the provisions of the 2d section, making it a misdemeanor for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states or with foreign nations." The court below sustained the contentions of the government. It, therefore, enjoined the two railroad companies from allowing the Northern Securities Company to vote the stock standing in its name or to pay to that company any dividends upon the stock by it held. On the giving, however, of a bond fixed by the court below the decree relating to the payment of dividends was suspended pending the appeal to this court.

The court recognized, however, the right of the Northern Securities Company to retransfer the stock in both railroads to the persons from whom it had been acquired. The correctness of the decree below is the question presented for decision.

Two questions arise. Does the anti-trust act, when rightly interpreted, apply to the acquisition and ownership by the Northern Securities Company of the stock in the two railroads? and, second, if it does, had Congress the power to regulate or control such acquisition and ownership? [The rest of Mr. Justice White's dissenting opinion, which relates to the power of Congress to regulate or control such acquisition and ownership, is omitted.]

Being of opinion, for the reasons heretofore given, that Congress was without power to regulate the acquisition and ownership of the stock in question by the Northern Securities Company, and because I think even if there were such power in Congress, it has not been exercised by the anti-trust act, as is shown in the opinion of Mr. Justice HOLMES, I dissent.

I am authorized to say that the Chief Justice, Mr. Justice PECKHAM, and Mr. Justice HOLMES, concur in this dissent.

MR. JUSTICE HOLMES, with whom concurred the Chief Justice, Mr. Justice WHITE, and Mr. Justice PECKHAM dissenting:

I am unable to agree with the judgment of the majority of the court, and although I think it useless and undesirable, as a rule to express dissent, I feel bound to do so in this case and to give my reasons for it.

Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend. What we have to do in this case is to find the meaning of some not very difficult words. We must try,—I have tried,—to do it with the same freedom of natural and spontaneous interpretation that one would be sure of if the same question arose upon an indictment for a similar act which excited no public attention, and was of importance only to a prisoner before the court. Furthermore, while at times judges need for their work the training of economists or statesmen, and must act in view of their foresight of consequences, yet, when their task is to interpret and apply the words of a statute, their function is merely academic to begin with,—to read English intelligently,—and a consideration of consequences comes into play, if at all, only when the meaning of the words used is open to reasonable doubt.

The question to be decided is whether, under the act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), it is unlawful, at any stage of the process, if several men unite to form a corporation for the purpose of buying more than half the stock of each of two competing interstate railroad companies, if they form the corporation, and the corporation buys the stock. I will suppose further that every step is taken, from the beginning, with the single intent of ending competition between the companies. I make this addition not because it may not be and is not disputed, but because, as I shall try to show, it is totally unimportant under any part of the statute with which we have to deal.

The statute of which we have to find the meaning is a criminal statute. The two sections on which the government relies both make certain acts crimes. That is their immediate purpose

and that is what they say. It is vain to insist that this is not a criminal proceeding. The words cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction. The construction which is adopted in this case must be adopted in one of the other sort. I am no friend of artificial interpretations because a statute is of one kind rather than another, but all agree that before a statute is to be taken to punish that which always has been lawful, it must express its intent in clear words. So I say we must read the words before us as if the question were whether two small exporting grocers should go to jail.

Again, the statute is of a very sweeping and general character. It hits "every" contract or combination of the prohibited sort, great or small, and "every" person who shall monopolize or attempt to monopolize, in the sense of the act, "any part" of the trade or commerce among the several states. There is a natural inclination to assume that it was directed against certain great combinations, and to read it in that light. It does not say so. On the contrary, it says "every," and "any part." Still less was it directed specially against railroads. There even was a reasonable doubt whether it included railroads until the point was decided by this court.

Finally, the statute must be construed in such a way as not merely to save its constitutionality, but, so far as is consistent with a fair interpretation, not to raise grave doubts on that score. I assume, for the purposes of discussion, although it would be a great and serious step to take, that in some case that seemed to it to need heroic measures, Congress might regulate not only commerce, but instruments of commerce, or contracts the bearing of which upon commerce would be only indirect. But it is clear that the mere fact of an indirect effect upon commerce, not shown to be certain and very great, would not justify such a law. The point decided in *United States v. E. C. Knight Co.* 156 U. S. 1, 17, 39 L. ed. 325, 331, was that "the fact . . . that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree." Commerce depends upon population, but Congress could not, on that ground, undertake to regulate marriage and divorce. If the act before us is to be carried out according to what seems to me the logic of the argument for the government, which I

do not believe that it will be, I can see no part of the conduct of life with which, on similar principles, Congress might not interfere.

This act is construed by the government to affect the purchasers of shares in two railroad companies because of the effect it may have, or, if you like, is certain to have, upon the competition of these roads. If such a remote result of the exercise of an ordinary incident of property and personal freedom is enough to make that exercise unlawful, there is hardly any transaction concerning commerce between the states that may not be made a crime by the finding of a jury or a court. The personal ascendancy of one man may be such that it would give to his advice the effect of a command, if he owned but a single share in each road. The tendency of his presence in the stockholders' meetings might be certain to prevent competition, and thus his advice, if not his mere existence, become a crime.

I state these general considerations as matters which I should have to take into account before I could agree to affirm the decree appealed from, but I do not need them for my own opinion, because, when I read the act I cannot feel sufficient doubt as to the meaning of the words to need to fortify my conclusion by any generalities. Their meaning seems to me plain on their face.

The 1st section makes "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations" a misdemeanor, punishable by fine, imprisonment, or both. Much trouble is made by substituting other phrases assumed to be equivalent, which then are reasoned from as if they were in the act. The court below argued as if maintaining competition were the expressed object of the act. The act says nothing about competition. I stick to the exact words used. The words hit two classes of cases, and only two,—contracts in restraint of trade and combinations or conspiracies in restraint of trade,—and we have to consider what these respectively are. Contracts in restraint of trade are dealt with and defined by the common law. They are contracts with a stranger to the contractor's business (although, in some cases, carrying on a similar one), which wholly or partially restrict the freedom of the contractor in carrying on that business as otherwise he

would. The objection of the common law to them was, primarily, on the contractor's own account. The notion of monopoly did not come in unless the contract covered the whole of England. *Mitchel v. Reynolds*, 1 P. Wms. 181. Of course, this objection did not apply to partnerships or other forms, if there were any, of substituting a community of interest where there had been competition. There was no objection to such combinations merely as in restraint of trade or otherwise unless they amounted to a monopoly. Contracts in restraint of trade, I repeat, were contracts with strangers to the contractor's business, and the trade restrained was the contractor's own.

Combinations or conspiracies in restraint of trade, on the other hand, were combinations to keep strangers to the agreement out of the business. The objection to them was not an objection to their effect upon the parties making the contract, the members of the combination or firm, but an objection to their intended effect upon strangers to the firm and their supposed consequent effect upon the public at large. In other words, they were regarded as contrary to public policy because they monopolized, or attempted to monopolize, some portion of the trade or commerce of the realm. See *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325. All that is added to the 1st section by § 2 is that like penalties are imposed upon every single person who, without combination, monopolizes, or attempts to monopolize, commerce among the states; and that the liability is extended to attempting to monopolize any part of such trade or commerce. It is more important as an aid to the construction of § 1 than it is on its own account. It shows that whatever is criminal when done by way of combination is equally criminal if done by a single man. That I am right in my interpretation of the words of § 1 is shown by the words "in the form of trust or otherwise." The prohibition was suggested by the trusts, the objection to which, as every one knows, was not the union of former competitors, but the sinister power exercised or supposed to be exercised by the combination in keeping rivals out of the business and ruining those who already were in. It was the ferocious extreme of competition with others, not the cessation of competition among the partners, that was the evil feared. Further proof is to be found in § 7, giving an action to any person injured in his business or

property by the forbidden conduct. This cannot refer to the parties to the agreement, and plainly means that outsiders who are injured in their attempt to compete with a trust or other similar combination may recover for it. *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, *ante*, 307. How effective this section may be or how far it goes is not material to my point. My general summary of the two classes of cases which the act affects is confirmed by the title, which is "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies."

What I now ask is under which of the foregoing classes this case is supposed to come; and that question must be answered as definitely and precisely as if we were dealing with the indictments which logically ought to follow this decision. The provision of the statute against contracts in restraint of trade has been held to apply to contracts between railroads, otherwise remaining independent, by which they restricted their respective freedom as to rates. This restriction by contract with a stranger to the contractor's business is the ground of the decision in *United States v. Joint Traffic Assn.* 171 U. S. 505, 43 L. ed. 259, following and affirming *United States v. Trans-Missouri Freight Assn.* 166 U. S. 290, 41 L. ed. 1007. I accept those decisions absolutely, not only as binding upon me, but as decisions which I have no desire to criticize or abridge. But the provision has not been decided, and, it seems to me, could not be decided without a perversion of plain language, to apply to an arrangement by which competition is ended through community of interest,—an arrangement which leaves the parties without external restriction. That provision, taken alone, does not require that all existing competitions shall be maintained. It does not look primarily, if at all, to competition. It simply requires that a party's freedom in trade between the states shall not be cut down by contract with a stranger. So far as that phrase goes, it is lawful to abolish competition by any form of union. It would seem to me impossible to say that the words "every contract in restraint of trade is a crime, punishable with imprisonment," would send the members of a partnership between, or a consolidation of, two trading corporations to prison,—still more impossible to say that it forbade one man or corporation to purchase as much stock as he liked in both. Yet

those words would have that effect if this clause of § 1 applies to the defendants here. For it cannot be too carefully remembered that that clause applies to "every" contract of the forbidden kind,—a consideration which was the turning point of the Trans-Missouri Freight Association's Case.

If the statute applies to this case it must be because the parties, or some of them, have formed, or because the Northern Securities Company is, a combination in restraint of trade among the states, or, what comes to the same thing, in my opinion, because the defendants, or some or one of them, are monopolizing, or attempting to monopolize, some part of the commerce between the states. But the mere reading of those words shows that they are used in a limited and accurate sense. According to popular speech, every concern monopolizes whatever business it does, and if that business is trade between two states it monopolizes a part of the trade among the states. Of course, the statute does not forbid that. It does not mean that all business must cease. A single railroad down a narrow valley or through a mountain gorge monopolizes all the railroad transportation through that valley or gorge. Indeed, every railroad monopolizes, in a popular sense, the trade of some area. Yet I suppose no one would say that the statute forbids a combination of men into a corporation to build and run such a railroad between the states.

I assume that the Minnesota charter of the Great Northern, and the Wisconsin charter of the Northern Pacific, both are valid. Suppose that, before either road was built, Minnesota, as part of a system of transportation between the states, had created a railroad company authorized singly to build all the lines in the states now actually built, owned, or controlled by either of the two existing companies. I take it that that charter would have been just as good as the present one, even if the statutes which we are considering had been in force. In whatever sense it would have created a monopoly, the present charter does. It would have been a large one, but the act of Congress makes no discrimination according to size. Size has nothing to do with the matter. A monopoly of "any part" of commerce among the states is unlawful. The supposed company would have owned lines that might have been competing; probably the present one does. But the act of Congress will

not be construed to mean the universal disintegration of society into single men, each at war with all the rest, or even the prevention of all further combinations for a common end.

There is a natural feeling that somehow or other the statute meant to strike at combinations great enough to cause just anxiety on the part of those who love their country more than money, while it viewed such little ones as I have supposed with just indifference. This notion, it may be said, somehow breathes from the pores of the act, although it seems to be contradicted in every way by the words in detail. And it has occurred to me that it might be that when a combination reached a certain size it might have attributed to it more of the character of a monopoly merely by virtue of its size than would be attributed to a smaller one. I am quite clear that it is only in connection with monopolies that size could play any part. But my answer has been indicated already. In the first place, size, in the case of railroads, is an inevitable incident; and if it were an objection under the act, the Great Northern and the Northern Pacific already were too great and encountered the law. In the next place, in the case of railroads it is evident that the size of the combination is reached for other ends than those which would make them monopolies. The combinations are not formed for the purpose of excluding others from the field. Finally, even a small railroad will have the same tendency to exclude others from its narrow area that great ones have to exclude others from the greater one, and the statute attacks the small monopolies as well as the great. The very words of the act make such a distinction impossible in this case, and it has not been attempted in express terms.

If the charter which I have imagined above would have been good notwithstanding the monopoly, in a popular sense, which it created, one next is led to ask whether and why a combination or consolidation of existing roads, although in actual competition, into one company of exactly the same powers and extent, would be any more obnoxious to the law. Although it was decided in *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 701, 40 L. ed. 849, 859, that since the statute, as before, the states have the power to regulate the matter, it was said, in the argument, that such a consolidation would be unlawful, and it seems to me that the Attorney General was compelled to say so

in order to maintain his case. But I think that logic would not let him stop there, or short of denying the power of a state at the present time to authorize one company to construct and own two parallel lines that might compete. The monopoly would be the same as if the roads were consolidated after they had begun to compete; and it is on the footing of monopoly that I now am supposing the objection made. But to meet the objection to the prevention of competition at the same time, I will suppose that three parties apply to a state for charters; one for each of two new and possibly competing lines respectively, and one for both of these lines, and that the charter is granted to the last. I think that charter would be good, and I think the whole argument to the contrary rests on a popular instead of an accurate and legal conception of what the word "monopolize" in the statute means. I repeat, that in my opinion there is no attempt to monopolize, and what, as I have said, in my judgment amounts to the same thing, that there is no combination in restraint of trade until something is done with the intent to exclude strangers to the combination from competing with it in some part of the business which it carries on.

Unless I am entirely wrong in my understanding of what a "combination in restraint of trade" means, then the same monopoly may be attempted and effected by an individual, and is made equally illegal in that case by § 2. But I do not expect to hear it maintained that Mr. Morgan could be sent to prison for buying as many shares as he liked of the Great Northern and the Northern Pacific, even if he bought them both at the same time and got more than half the stock of each road.

There is much that was mentioned in argument which I pass by. But in view of the great importance attached by both sides to the supposed attempt to suppress competition, I must say a word more about that. I said at the outset that I should assume, and I do assume, that one purpose of the purchase was to suppress competition between the two roads. I appreciate the force of the argument that there are independent stockholders in each; that it cannot be presumed that the respective boards of directors will propose any illegal act; that if they should they could be restrained, and that all that has been done as yet is too remote from the illegal result to be classed even

as an attempt. Not every act done in furtherance of an unlawful end is an attempt or contrary to the law. There must be a certain nearness to the result. It is a question of proximity and degree. *Com. v. Peaslee*, 177 Mass. 267, 272, 59 N. E. 55. So, as I have said, is the amenability of acts in furtherance of interference with commerce among the states to legislation by Congress. So, according to the intimation of this court, is the question of liability under the present statute. *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290; *Anderson v. United States*, 171 U. S. 604, 43 L. ed. 300. But I assume further, for the purposes of discussion, that what has been done is near enough to the result to fall under the law, if the law prohibits that result, although that assumption very nearly, if not quite, contradicts the decision in *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325. But I say that the law does not prohibit the result. If it does it must be because there is some further meaning than I have yet discovered in the words "combinations in restraint of trade." I think that I have exhausted the meaning of those words in what I already have said. But they certainly do not require all existing competitions to be kept on foot, and, on the principle of the *Trans-Missouri Freight Association's Case*, invalidate the continuance of old contracts by which former competitors united in the past.

A partnership is not a contract or combination in restraint of trade between the partners unless the well known words are to be given a new meaning, invented for the purposes of this act. It is true that the suppression of competition was referred to in *United States v. Trans-Missouri Freight Asso.*, 166 U. S. 290, 41 L. ed. 1007, but, as I have said, that was in connection with a contract with a stranger to the defendant's business,—a true contract in restraint of trade. To suppress competition in that way is one thing; to suppress it by fusion is another. The law, I repeat, says nothing about competition, and only prevents its suppression by contracts or combinations in restraint of trade, and such contracts or combinations derive their character as restraining trade from other features than the suppression of competition alone. To see whether I am wrong, the illustrations put in the argument are of use. If I am, then a partnership between two stage drivers who had been competitors in driving across a state line, or two mer-

chants once engaged in rival commerce among the states, whether made after or before the act, if now continued, is a crime. For, again I repeat, if the restraint on the freedom of the members of a combination, caused by their entering into partnership, is a restraint of trade, every such combination, as well the small as the great, is within the act.

In view of my interpretation of the statute I do not go further into the question of the power of Congress. That has been dealt with by my brother White and I concur, in the main, with his views. I am happy to know that only a minority of my brethren adopt an interpretation of the law which, in my opinion, would make eternal the *bellum omnium contra omnes* and disintegrate society so far as it could into individual atoms. If that were its intent I should regard calling such a law a regulation of commerce as a mere pretense. It would be an attempt to reconstruct society. I am not concerned with the wisdom of such an attempt, but I believe that Congress was not intrusted by the Constitution with the power to make it, and I am deeply persuaded that it has not tried.

I am authorized to say that the Chief Justice, Mr. Justice WHITE, and Mr. Justice PECKHAM, concur in this dissent.

UNITED STATES v. TERMINAL RAILROAD ASSN. OF ST. LOUIS

(Supreme Court of United States, 1912. 224 U. S. 383.)¹⁸

MR. JUSTICE LURTON delivered the opinion of the court:

The United States filed this bill to enforce the provisions of the Sherman act of July 2, 1890, chap. 647, 26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3200, against thirty-eight corporate and individual defendants named in the margin,^{18a} as a com-

18—Only the opinion of the court is given.

18a—The Terminal Railroad Association of St. Louis; the St. Louis Merchants' Bridge Terminal Railway Company; the Wiggins Ferry Company; the St. Louis Bridge Com-

pany; the St. Louis Merchants' Bridge Company; the Missouri, Kansas & Texas Railway Company; the St. Louis & San Francisco Railway Company; the Chicago & Alton Railway Company; the Baltimore & Ohio Southwestern Railroad Com-

bination in restraint of interstate commerce and as a monopoly forbidden by that law. The cause was heard by the four circuit judges, who, being equally divided in judgment, dismissed the bill, without filing an opinion. From this decree the United States has appealed.

The principal defendant is the Terminal Railroad Association of St. Louis, hereinafter designated as the terminal company. It is a corporation of the state of Missouri, and was organized under an agreement made in 1889 between Mr. Jay Gould and a number of the defendant railroad companies for the express purpose of acquiring the properties of several independent terminal companies at St. Louis, with a view to combining and operating them as a unitary system.

The terminal properties first acquired and combined into one system by the terminal company comprised the following: The Union Railway & Transit Company of St. Louis and East St. Louis; the Terminal Railroad of St. Louis and East St. Louis; the Union Depot Company of St. Louis; the St. Louis Bridge Company; and the Tunnel Railroad of St. Louis. These properties included the great union station, the only existing railroad bridge,—the Eads or St. Louis bridge,—and every connecting or terminal company by means of which that bridge could be used by railroads terminating on either side of the river. For a time this combination was operated in competition with the terminal system of the Wiggins Ferry Company, and upon the completion of the Merchants' bridge, in competition with it, and a system of terminals which were organized in connection with it. The Wiggins Ferry Company had for many

pany; the Illinois Central Railroad Company; the St. Louis, Iron Mountain & Southern Railway Company; the Chicago, Burlington & Quincy Railway Company; the St. Louis, Vandalia & Terre Haute Railroad Company; the Wabash Railroad Company; the Cleveland, Cincinnati, Chicago & St. Louis Railway Company; the Louisville & Nashville Railroad Company; the Southern Railway Company; the Chicago,

Rock Island & Pacific Railway Company; the Missouri Pacific Railway Company; the Central Trust Company of New York; A. A. Allen, S. M. Felton, A. J. Davidson, W. M. Green, J. T. Harahan, C. S. Clarke, H. Miller, Benjamin McKean, Joseph Ramsey, George E. Evans, C. E. Schaff, T. C. Powell, J. F. Stevens, A. G. Cochran, W. S. McChesney, Julius Walsh, V. W. Fisher and S. D. Webster.

years operated car transfer boats by means of which cars were transferred between St. Louis and East St. Louis.

Upon each side of the river it owned extensive railway terminal facilities, with which connection was maintained with the many railroads terminating on the west and east sides of the rivers, which gave such roads connection with each other, as well as access to many of the industrial and business districts on each side. In 1890 a third terminal system was opened up by the completion of a second railroad bridge over the Mississippi river at St. Louis, known as the Merchants' bridge. This was a railroad toll bridge, open to every railroad upon equal terms. That it might forever maintain the potentiality of competition as a railroad bridge, the act of Congress authorizing its construction provided that no stockholders in any other railway bridge company should become a stockholder therein. But as this was a mere bridge company, it was essential that railroad companies desiring to use it should have railway connections with it on each side of the river. For this purpose two or more railway companies were organized and lines of railway were constructed connecting each end of the Merchants' bridge with various railroad systems terminating on either side of the river. The Merchants' bridge and its allied terminals were thereby able to afford many, if not all, of the railroads coming into St. Louis, access to the business districts on both sides of the river, and connection with each other.

Thus, for a time, there existed three independent methods by which connection was maintained between railroads terminating on either side of the river at St. Louis: First, the original Wiggins Ferry Company, and its railway terminal connections; second, the Eads Railroad bridge and the several terminal companies by means of which railroads terminating at St. Louis were able to use that bridge, and connect with one another, constituting the system controlled by the terminal company; and, third, the Merchants' bridge and terminal facilities owned and operated by companies in connection therewith.

This resulted in some cases in an unnecessary duplication of facilities, but it at least gave to carriers and shippers some choice, a condition which, if it does not lead to competition in charges, does insure competition in service. Important as were the considerations mentioned, their independence of one an-

other served to keep open the means for the entrance of new lines to the city, and was an obstacle to united opposition from existing lines. The importance of this will be more clearly seen when we come to consider the topographical conditions of the situation.

That the promoters of the terminal company designed to obtain the control of every feasible means of railroad access to St. Louis, or means of connecting the lines of railway entering on opposite sides of the river, is manifested by the declarations of the original agreement, as well as by the successive steps which followed. Thus, the proviso in the act of Congress authorizing the construction of the Merchants' bridge, which forbade the ownership of its stock, by any other bridge company or stockholder in any such company, was eliminated by an act of Congress, and shortly thereafter the terminal company obtained stock control of the Merchants' Bridge Company, and of its related terminal companies, and likewise a lease.

The Wiggins Ferry Company owned the river front on the Illinois shore opposite St. Louis for a distance of several miles. It had on that side and on its own property, switching yards and other terminal facilities. From these yards extended lines of rails which connected with its car transfer boats and with the termini of railroads on the Illinois side. On the St. Louis side of the river it had like facilities by which it was in connection with railway lines terminating on that side. That company was consequently able to interchange traffic between the systems on opposite sides of the river, and to serve many industries. In 1892 the Rock Island Railroad Company endeavored to obtain an independent entrance to the city. For this purpose it sought to acquire the facilities owned by the Wiggins Ferry Company by securing a control of its capital stock. This was not deemed desirable by the railroad companies which jointly owned the terminal company's facilities, and to prevent this acquisition effort was made to secure control of the stock. The competition was fierce and the market price of the shares pushed to an abnormal price. The final result being in doubt, an agreement was reached by which the Rock Island Company was admitted to joint ownership with the other proprietary companies in all of the terminal proper-

ties which were operated by the terminal company, or which should be acquired by it. The shares in the ferry company bought by the Rock Island were transferred to the terminal company at cost, and were paid for by that company. These shares, united with those which had been acquired by the terminal company, enabled the latter to absorb the properties of the ferry company, and thus the three independent terminal systems were combined into a single system.

We come, then, to the question upon which the case must turn: Has the unification of substantially every terminal facility by which the traffic of St. Louis is served resulted in a combination which is in restraint of trade within the meaning and purpose of the anti-trust act?

It is not contended that the unification of the terminal facilities of a great city where many railroad systems center is, under all circumstances and conditions, a combination in restraint of trade or commerce. Whether it is a facility in aid of interstate commerce or an unreasonable restraint, forbidden by the act of Congress, as construed and applied by this court in the cases of *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. ed. 619, 34 L. R. A. (N. S.) 834, and *United States v. American Tobacco Co.*, 221 U. S. 106, 55 L. ed. 663, will depend upon the intent to be inferred from the extent of the control thereby secured over instrumentalities which such commerce is under compulsion to use, the method by which such control has been brought about, and the manner in which that control has been exerted.

The consequences to interstate commerce of this combination cannot be appreciated without a consideration of natural conditions greatly affecting the railroad situation at St. Louis. Though twenty-four lines of railway converge at St. Louis, not one of them passes through. About one half of these lines have their termini on the Illinois side of the river. The others, coming from the west and north, have their termini either in the city or on its northern edge. To the river the city owes its origin, and for a century and more its river commerce was predominant. It is now the great obstacle to connection between the termini of lines on opposite sides of the river and any entry into the city by eastern lines. The cost of construction and maintenance of railroad bridges over so great a river

makes it impracticable for every road desiring to enter or pass through the city to have its own bridge. The obvious solution is the maintenance of toll bridges open to the use of any and all lines, upon identical terms. And so the commercial interests of St. Louis sought to solve the question, the system of car ferry transfer being inadequate to the growing demands of an ever-increasing population. The first bridge, called the Eads bridge, was, and is, a toll bridge. Any carrier may use it on equal terms. But to use it there must be access over rails connecting the bridge and the railway. On the St. Louis side the bridge terminates at the foot of the great hills upon which the city is built; on the Illinois side it ends in the low and wide valley of the Mississippi. This condition resulted in the organization of independent companies which undertook to connect the bridge on each side with the various railroad termini. On the Missouri side it was necessary to tunnel the hills, that the valley of Mill creek might be reached, where the roads from the west had their termini. Thus, though the bridge might be used by all upon equal terms, it was accessible only by means of the several terminal companies operating lines connecting it with the railroad termini.

This brought about a condition which led to the construction of the second bridge, the Merchants' bridge. This, too, was, and is, a toll bridge, and may be used by all upon equal terms. To prevent its control by the Eads Bridge Company, it was carefully provided that no stockholder in any other bridge company should own its shares. But this Merchants' bridge, like the Eads bridge, had no rail connections with any of the existing railroad systems, and these facilities, as in the case of the Eads bridge, were supplied by a number of independent railway companies who undertook to fill in the gaps between the bridge ends and the termini of railroads on both sides of the river. It must be also observed that these terminal companies were in many instances so supplied with switch connections as not only to connect with the bridge, but also served to connect such roads with each other and with the industries along their lines. Now, it is evident that these lines connecting railroad termini with the railroad bridges dominated the situation. They stood, as it were, just outside the gateway, and none could enter, though the gate stood open, who did not

comply with their terms. The topographical situation making access to the city difficult does not end with the river. The city lies upon a group of great hills which hug the river closely and rapidly recede to the west. These hills are penetrated on the west by the narrow valley of Mill creek, which crosses the city about its center. Railways coming from the west use this valley, but its facilities are very restricted and now quite occupied. North of the city the hills drop back from the river gradually, and there exists a valley formed by the Mississippi and Missouri rivers. Railroads coming from the north on the west side of the river come by this valley. As we have stated before, the valley of the Mississippi at St. Louis is on the Illinois side of the river. Railroads coming from the east, northeast, and southeast have their termini in that valley. As a consequence, there have grown up numerous cities and towns of some consequence as manufacturing places, the chief of which is East St. Louis.

The result of the geographical and topographical situation is that it is, as a practical matter, impossible for any railroad company to pass through, or even enter St. Louis, so as to be within reach of its industries or commerce, without using the facilities entirely controlled by the terminal company. The averment of the bill that the railroad companies, here defendants, being the sole stockholders of the terminal company, as we shall later see, compel all other railroad companies converging at St. Louis to use the facilities owned and operated by the terminal company, is therefore borne out by the facts of the situation. Nor is this effect denied; for the learned counsel representing the proprietary companies, as well as the terminal company, say in their filed brief: "There indeed is compulsion, but it is inherent in the situation. The other companies use the terminal properties because it is not possible to acquire adequate facilities for themselves. The cost to any one company is prohibitive." Obviously, this was not true before the consolidation of the systems of the Wiggins Ferry Company and the Merchants' Bridge Company with the system theretofore controlled by the terminal company. That the nonproprietary companies might have been compelled to use the instrumentalities of one or the other of the three systems then available, and that the advantages secured might

not have been so great as those offered by the unified system now operated by the terminal company, must be admitted. But that there existed before the three terminal systems were combined a considerable measure of competition for the business of the other companies, and a larger power of competition, is undeniable. That the fourteen proprietary companies did not then have the power they now have to exclude either existing roads not in the combination, or new companies, from acquiring an independent entrance into the city, is also indisputable. The independent existence of these three terminal systems was therefore a menace to complete domination, as keeping open the way for greater competition. Only by their absorption or some equivalent arrangement was it possible to exclude from independent entrance the Rock Island Company, or any other company which might desire its own terminals. To close the door to competition, large sums were expended to acquire stock control. For this purpose the obligations of the absorbed companies were assumed and new funds obtained by mortgages upon the unified system.

The physical conditions which compel the use of the combined system by every road which desires to cross the river, either to serve the commerce of the city or to connect with lines separated by the river, is the factor which gives greatest color to the unlawfulness of the combination as now controlled and operated. If the terminal company was in law and fact the agent of all, the mere unification which has occurred would take on quite a different aspect. It becomes, therefore, of the utmost importance to know the character and purpose of the corporation which has combined all of the terminal instrumentalities upon which the commerce of a great city and gateway between the East and West must depend. The fact that the terminal company is not an independent corporation at all is of the utmost significance. There are twenty-four railroads converging at St. Louis. The relation of the terminal company is not one of impartiality to each of them. It was organized in 1889, at the instance of six of these railroad companies, for the purpose of acquiring all existing terminal instrumentalities for the benefit of the combination, and such other companies as they might thereafter admit to joint ownership by unanimous consent, and upon a consideration to be agreed

upon. From time to time other companies came to an agreement with the original proprietors until, at the time this bill was filed, the properties unified were held for the joint use of the fourteen companies made defendants. In the contract of 1889, above referred to, the purpose of acquiring the first terminals combined is declared to be, "that said properties may be held in perpetuity as a unit, and developed and improved in the interest of the proprietary companies, for the purpose of furnishing adequate terminal facilities in St. Louis and East St. Louis." This purpose was carried out by the conveyance to "each of the proprietary companies . . . forever, a right of joint use with each other and such other companies as may be admitted as proprietary lines to joint use thereof, of all said terminal properties . . . now held or that may be hereafter acquired in St. Louis and East St. Louis, . . . it being understood that the right herein granted to each proprietary company is not transferable to any extent whatever, but is to remain as an appurtenant to the railroad now owned by each proprietary company."

That these facilities were not to be acquired for the benefit of any railroad company which might desire a joint use thereof was made plain by a provision in the contract referred to, which stipulated that other railroad companies not named therein as proprietary companies might only be admitted "to joint use of said terminal system on unanimous consent, but not otherwise, of the directors of the first party, and on payment of such a consideration as they may determine, and on signing this agreement," etc. Inasmuch as the directors of the terminal company consisted of one representative of each of the proprietary companies, selected by itself, it is plain that each of said companies had and still has a veto upon any joint use or control of terminals by any nonproprietary company.

By that and the supplemental agreement of December, 1902, the ferry company and the Merchants' Bridge Company having then been absorbed, the proprietary companies prescribe that the charges of the company shall be so adjusted as to produce no more revenue than shall equal the fixed charges, operating and maintenance expenses. Deficiencies for those purposes the proprietary companies guarantee to make good, though such

payments are to be reimbursed by an increase in charges, if necessary.

We fail to find in either of the contracts referred to any provision abrogating the requirement of unanimous consent to the admission of other companies to the ownership of the terminal company, though counsel say that no such company will now find itself excluded from joint use or ownership upon application. That other companies are permitted to use the facilities of the terminal company upon paying the same charges paid by the proprietary companies seems to be conceded. But there is no provision by which any such privilege is accorded.

By still another clause in the agreement the proprietary companies obligate themselves to forever use the facilities of the terminal company for all business destined to cross the river. This would seem to guarantee against any competitive system, since the companies to the agreement now control about one-third of the railroad mileage of the United States.

In acquiring these properties the terminal company has assumed mortgage and stock dividend obligations of the constituent companies aggregating about twenty-five million dollars. It has executed its own mortgage upon all of its property to secure an issue of fifty million dollars of bonds, of which twenty million dollars worth have been sold, and the proceeds used in construction or in paying for the properties acquired. It has thus about forty-five million dollars of mortgage or fixed charges or liabilities. The company has an authorized capital stock of fifty million dollars. Of this about twenty-eight million dollars have been issued in equal proportions to the several owning railroad companies. No dividends have ever been paid, and the company disclaims any purpose to pay dividends. We fail to find any obligation by which they may be prevented from paying dividends upon the stock held by the proprietary companies, or that in its treasury, if ever issued. Undoubtedly, the major part of this revenue arises from the business done by the proprietary companies through the terminal company, but that coming from other companies is, however, a large contribution. That no direct profit is derived by the owning companies from the operation of the terminals may be true. But it is not clear that

the proprietary companies do not make an indirect profit through ownership of obligations of the absorbed companies.

That through their ownership and exclusive control they are in possession of advantages in respect to the enormous traffic which must use the St. Louis gateway is undeniable. That the proprietary companies have not availed themselves of the full measure of their power to impede free competition of outside companies may be true. Aside from their power under all of the conditions to exclude independent entrance to the city by any outside company, their control has resulted in certain methods which are not consistent with freedom of competition. To these acts we shall refer later.

We are not unmindful of the essential difference between terminal systems properly so described and railroad transportation companies. The first are but instrumentalities which assist the latter in the transfer of traffic between different lines, and in the collection and distribution of traffic. They are a modern evolution in the doing of railroad business, and are of the greatest public utility. They, under proper conditions, do not restrain, but promote, commerce.

The argument that the combination of the instrumentalities operated by the terminal company with those of the Merchants' Bridge Company was a combination of two competing lines of railroad, such as was condemned in *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. ed. 679, is not well founded. This combination, if properly regarded as of parallel and competing lines, would have been obnoxious to the 17th section of the Constitution of Missouri. For the purpose of enforcing this Missouri prohibition, the state instituted a proceeding to dissolve the combination of the properties of the Merchants' Bridge Terminal Railroad Company with the Terminal Railroad Association of St. Louis, upon the ground that the railroads operated by those companies were parallel and competing lines of railroad. Relief was denied. The Missouri court held that the merger of mere railway terminals used to facilitate the public convenience by the transfer of cars from one line of railway to another, and instrumentalities for the distribution or gathering of traffic, freight or passenger, among scattered industries, or to different business centers of a great city, were not properly railroad companies within the reason-

able meaning of the statutes forbidding combinations between competing or parallel lines of railroad. Referring to the legitimate use of terminal companies, the Missouri court said:

"A more effectual means of keeping competition up to the highest point between parallel or competing lines could not be devised. The destruction of the system would result in compelling the shipper to employ the railroad with which he has switch connection, or else cart his product to a distant part of the city, at a cost possibly as great as the railroad tariff.

"St. Louis is a city of great magnitude in the extent of its area, its population, and its manufacturing and other business. A very large number of trunk-line railroads converge in this city. In the brief of one of the well-informed counsel in this case it is said that St. Louis is one of the largest railroad centers in the world. Suppose it were required of every railroad company to effect its entrance to the city as best it could and establish its own terminal facilities, we would have a large number of passenger stations, freight depots and switch yards scattered all over the vast area, and innumerable vehicles employed in hauling passengers and freight to and from those stations and depots. Or suppose it became necessary in the exigency of commerce that all in-coming trains should reach a common focus, but every railroad company provide its own track; then not only would the expense of obtaining the necessary rights of way be so enormous as to amount to the exclusion of all but a few of the strongest roads, but, if it could be accomplished, the city would be cut to pieces with the many lines of railroad intersecting it in every direction, and thus the greatest agency of commerce would become the greatest burden." 182 Mo. 284, 299.

Among the cases in which the public utility of such companies has been recognized are: *Bridwell v. Gate City Terminal Co.*, 127 Ga. 520, 10 L.R.A.(N.S.) 909; *Indianapolis Union R. Co. v. Cooper*, 6 Ind. App. 202; *State ex rel. Little v. Martin*, 51 Kan. 462; *Worcester v. Norwich & W. R. Co.* 109 Mass. 103; *Fort-street Union Depot Co. v. Morton*, 83 Mich. 265; *State v. St. Paul Union Depot Co.*, 42 Minn. 142, 6 L.R.A. 234; *Ryan v. Louisville & N. Terminal Co.*, 102 Tenn. 124, 45 L.R.A. 303.

While, therefore, the mere combining of several independent

terminal systems into one may not operate as a restraint upon the interstate commerce which must use them, yet there may be conditions which will bring such a combination under the prohibition of the Sherman act. The one in question, counsel say, is not antagonistic to, but in harmony with, the anti-trust act, "because it expands competition by extending equal conveniences and advantages to all shippers located upon each of the three systems for all traffic to and from St. Louis; expedites and economizes the service." It is justified, they argue, by: "(1) The physical or topographical conditions peculiar to the locality; by (2) its commercial, industrial, and railroad development and history; by (3) public opinion expressed legislatively and judicially; and (4) by the judgment of experienced railroad engineers and managers." From which consideration the same counsel say that the issue presented by this record is, "whether the common control or ownership of all the terminal facilities (mechanical devices for the exchange, receipt, and distribution of traffic) of a large commercial and manufacturing center by all of the railroad companies, and for the benefit of all upon equal terms and facilities, without discrimination, is condemned by the Sherman act."

Let us analyze the proposition included in the issue, as stated by counsel, quoted above: Counsel assume that the combined terminals have come under a "common control or ownership." But this is not the case. That the instrumentalities so combined are not jointly owned or managed by all of the companies compelled to use them is a significant fact which must be taken into account for the purpose of determining whether there has been a violation of the anti-trust act. The control and ownership is that of the fourteen roads which are defendants. The railroad systems and the coal roads converging at St. Louis, which are not associated with the proprietary companies, are under compulsion to use the terminal system, and yet have no voice in its control.

It cannot be controverted that, in ordinary circumstances, a number of independent companies might combine for the purpose of controlling or acquiring terminals for their common but exclusive use. In such cases other companies might be admitted upon terms or excluded altogether. If such terms were too onerous, there would ordinarily remain the right and

power to construct their own terminals. But the situation at St. Louis is most extraordinary, and we base our conclusion in this case, in a large measure, upon that fact. The "physical or topographical condition peculiar to the locality," which is advanced as a prime justification for a unified system of terminals, constitutes a most obvious reason why such a unified system is an obstacle, a hindrance, and a restriction upon interstate commerce, unless it is the impartial agent of all who, owing to conditions, are under such compulsion, as here exists, to use its facilities. The witness upon whom the defendants chiefly rely to uphold the advantages of the unified system which has been constructed, Mr. Albert L. Perkins, gives this as his unqualified judgment. He was and is an experienced railroad engineer and manager and is the railway expert of the municipal bridge and terminal board, a commission appointed under a city ordinance, headed by the mayor, to study and report legislation needed to relieve the terminal conditions of St. Louis. From his study of the local situation he expresses the opinion that the terminals of railway lines in any large city should be unified as far as possible, and that such unification may be of the greatest public utility and of immeasurable advantage to commerce, state and interstate. Neither does he find in the conditions at St. Louis any insurmountable objection to such unification. The witness, however, points out that such a terminal company should be the agent of every company, and, furthermore, that its service should not be for profit or gain. In short, that every railroad using the service should be a joint owner and equally interested in the control and management. This, he thinks, will serve the greatest possible economy, and will give the most efficient service without discrimination. When thus jointly owned and controlled, whether through the medium of a mere holding or operating company, such as the terminal company is, or by other means, the facilities would belong to each relatively to its own business, and delivery would be made by each company over its own tracks to connecting lines or places of destination in the city. The charge for the haul thus lengthened would then be properly absorbed by the through rate, leaving nothing to be added to that to be charged the shipper or consignee but switching and storage charges proper.

The terminal properties in question are not so controlled and managed, in view of the inherent local conditions, as to escape condemnation as a restraint upon commerce. They are not under a common control and ownership. Nor can this be brought about unless the prohibition against the admission of other companies to such control is stricken out and provision made for the admission of any company to an equal control and management upon an equal basis with the present proprietary companies.

There are certain practices of this terminal company which operate to the disadvantage of the commerce which must cross the river at St. Louis, and of non-proprietary railroad lines compelled to use its facilities. One of them grows out of the fact that the terminal company is a terminal company and something more. It does not confine itself to supplying and operating mere facilities for the interchange of traffic between railroads, and to assistance in the collecting and distributing of traffic for the carrier companies. It, as well as several of the absorbed terminal companies, was organized under ordinary railroad charters. If the combination which has occurred is to escape condemnation as a combination of parallel and competing railroad companies, it is because of the essential difference between railroad and terminal companies proper—differences pointed out by the Missouri supreme court in the case heretofore referred to. Indeed, the defense to this proceeding is based upon the insistence that the terminal company is solely engaged in operating terminal facilities, defined in the briefs "as mechanical devices for the exchange, receipt, and distribution of traffic." This terminal company, in addition to its schedule for terminal charges proper, such as switching, warehousing etc., files its rate-sheets for the transportation of every class of merchandise from the termini of the railroads on the Illinois side of the river to destinations across the river, over its lines. These rates are applied to all traffic destined to cross the river, with certain exceptions to which we shall later refer, which originates within an irregular area of which St. Louis is the center, and having a diameter of from 1 to 200 miles. This arbitrary operates to cast a burden upon short hauls, which has led to much complaint, as being both discriminatory and extortionate. An exception

is made as to traffic originating within so much of this area as constitutes what is called "Green Line territory," or which is destined to points within "Green Line territory." This seems to be based upon competitive conditions caused by the great toll railway bridge at Memphis, Tennessee, the bridge toll being treated by lines using the bridge as a part of the through rate.

Another exception to the rule imposing this arbitrary is that it does not apply to traffic which originates in East St. Louis, whether it is destined to cross the river or not. The reason for this exemption, where such traffic does cross the river, is not apparent. Possibly, it may be said that it is because the traffic of St. Louis and East St. Louis should be treated as arising in the same commercial area. But this reason does not seem to apply to the traffic originating in St. Louis, which is bound east, though that of East St. Louis is altogether free from this arbitrary charge. The effect of this arbitrary discrimination is obviously injurious to the commerce and manufacturers of St. Louis, and is among the chief causes of complaint against the terminal company. Mr. Perkins, to whom we have before referred as a capable and impartial expert, says of the consequence of this curious exception out of the 100-mile area rule, that "the effect of these charges was, of course, to put the man doing business in St. Louis at a disadvantage to that extent with the man doing business at East St. Louis on his eastern business. Again he says, that the practical operation was to give East St. Louis a distinct advantage in the manufacturing lines. Another practice which marks this terminal company as a transportation company which interposed itself between railroads having their termini on opposite sides of the river, and between the city itself and the roads terminating on the east side of the river, is that all traffic destined to cross the river at St. Louis, whether bound east or west, or destined for the city if coming from the east, is billed only to East St. Louis, and there rebilled to destination.

The practice of rebilling and of making a distinct hauling charge is an evident survival of the methods which existed when the eastern lines had no termini in St. Louis. They then billed to East St. Louis, and there turned the traffic over to

one of the existing terminal companies, who made their own specific charges for the haul to places of delivery within the city. The practice has been continued after the reason for it has disappeared. The effect of this practice of rebilling at East St. Louis and of imposing this arbitrary upon traffic originating within 100 miles of the city, destined to cross the river, seems to have been also applied to the large coal traffic between the Illinois coal mines, upon which the city is largely dependent.

We come now to the remedy. In determining what this should be, we, as said by this court in *Standard Oil Co. v. United States*, 221 U. S. 1, 78, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, must not overlook the fact that in applying a remedy "injury to the public by the prevention of an undue restraint on or the monopolization of trade or commerce is the foundation upon which the prohibitions of the statute rest; and, moreover, that one of the fundamental purposes of the statute is to protect, not to destroy, rights of property." If, as we have already said, the combination of two or more mere terminal companies into a single system does not violate the prohibition of the statute against contracts and combinations in restraint of interstate commerce, it is because such a combination may be of the greatest public utility. But when, as here, the inherent conditions are such as to prohibit any other reasonable means of entering the city, the combination of every such facility under the exclusive ownership and control of less than all of the companies under compulsion to use them violates both the first and second sections of the act, in that it constitutes a contract or combination in restraint of commerce among the states, and an attempt to monopolize commerce among the states which must pass through the gateway at St. Louis.

The government has urged a dissolution of the combination between the terminal company, the Merchants' Bridge Terminal Company, and the Wiggins Ferry Company. That remedy may be necessary unless one equally adequate can be applied.

But the illegal restraint upon commerce among the states which we here find to exist consists in the possession acquired by the proprietary companies through the means and with the object we have stated, of dominating commerce among the

states, carried on by other railroads entering or seeking to enter the city of St. Louis, and by which such railroads are compelled either to desist from carrying on interstate commerce, or to do so upon the terms imposed by the proprietary companies. This control and possession constitute such a grip upon the commerce of St. Louis and commerce which must cross the river there, whether coming from the east or west, as to be both an illegal restraint and an attempt to monopolize.

The power resulting from the combination, even before completed by the acquisition of the Wiggins Ferry Company and its related terminals, was exhibited when the Rock Island sought an independent entrance.

Some of its abuses are shown by the imposition of the arbitrary hauling charge imposed upon the artificially limited trade districts described. It is shown also by the maintenance of the system of billing traffic destined to cross the river at St. Louis, either east or west, or to St. Louis, if from points on the east side of the river—a practice so galling and universal as to practically “eliminate St. Louis from the railroad map,” to quote the graphic, if extravagant, language of counsel for the United States, as respects the great traffic subject to the regulation.

Plainly the combination which has occurred would not be an illegal restraint under the terms of the statute if it were what is claimed for it, a proper terminal association acting as the impartial agent of every line which is under compulsion to use its instrumentalities. If, as we have pointed out, the violation of the statute, in view of the inherent physical conditions, grows out of administrative conditions which may be eliminated and the obvious advantages of unification preserved, such a modification of the agreement between the terminal company and the proprietary companies as shall constitute the former the bona fide agent and servant of every railroad line which shall use its facilities, and an inhibition of certain methods of administration to which we have referred, will amply vindicate the wise purpose of the statute, and will preserve to the public a system of great public advantage.

These considerations lead to a reversal of the decree dismissing the bill. This is accordingly adjudged, and the case is

remanded to the district court, with directions that a decree be there entered directing the parties to submit to the court, within ninety days after receipt of mandate, a plan for the reorganization of the contract between the fourteen defendant railroad companies and the terminal company, which we have pointed out as bringing the combination within the inhibition of the statute.

First. By providing for the admission of any existing or future railroad to joint ownership and control of the combined terminal properties, upon such just and reasonable terms as shall place such applying company upon a plane of equality in respect of benefits and burdens with the present proprietary companies.

Second. Such plan of reorganization must also provide definitely for the use of the terminal facilities by any other railroad not electing to become a joint owner, upon such just and reasonable terms and regulations as will, in respect of use, character, and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies.

Third. By eliminating from the present agreement between the terminal company and the proprietary companies any provision which restricts any such company to the use of the facilities of the terminal company.

Fourth. By providing for the complete abolition of the existing practice of billing to East St. Louis, or other junction points, and then rebilling traffic destined to St. Louis, or to points beyond.

Fifth. By providing for the abolition of any special or so-called arbitrary charge for the use of the terminal facilities in respect of traffic originating within the so-called 100-mile area, that is not equally and in like manner applied in respect of all other traffic of a like character originating outside of that area.

Sixth. By providing that any disagreement between any company applying to become a joint owner or user, as herein provided for, and the terminal or proprietary companies, which shall arise after a final decree in this cause, may be submitted to the district court, upon a petition filed in this cause, subject to review by appeal in the usual manner.

Seventh. To avoid any possible misapprehension, the decree should also contain a provision that nothing therein shall be taken to affect in any wise or at any time the power of the Interstate Commerce Commission over the rates to be charged by the terminal company, or the mode of billing traffic passing over its lines, or the establishing of joint through rates or routes over its lines, or any other power conferred by law upon such Commission.

Upon failure of the parties to come to an agreement which is in substantial accord with this opinion and decree, the court will, after hearing the parties upon a plan for the dissolution of the combination between the terminal company, the Wiggins Ferry Company, the Merchant's Bridge Company, and the several terminal companies related to the Ferry and Merchants' Bridge Company, make such order and decree for the complete disjoinder of the three systems, and their future operation as independent systems, as may be necessary, enjoining the defendants, singly and collectively, from any exercise of control or dominion over either of the said terminal systems, or their related constituent companies, through lease, purchase, or stock control, and enjoining the defendants from voting any share in any of said companies or receiving dividends, directly or indirectly, or from any future combination of the said systems, in evasion of such decree or any part thereof.

Reversed and remanded accordingly.

Mr. Justice HOLMES took no part in the hearing or determination of this case.

UNITED STATES v. UNION PACIFIC RAILROAD COMPANY

(Supreme Court of United States, 1912. 226 U. S. 61, 470.)

MR. JUSTICE DAY ¹⁹ delivered the opinion of the court:

The case was begun in the United States circuit court for the district of Utah to enforce the provisions of the so-called

¹⁹—Only the opinion of the court is given.

Sherman anti-trust act of 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp Stat. 1901, p. 3200) against certain alleged conspiracies and combinations in restraint of interstate commerce. The case in its principal aspect grew out of the purchase by the Union Pacific Railroad Company in the month of February, 1901, of certain shares of the capital stock of the Southern Pacific Company from the devisees under the will of the late Collis P. Huntington, who had formerly owned the stock. Other shares of Southern Pacific stock were acquired at the same time, the holding of the Union Pacific amounting to 750,000 shares, or about $37\frac{1}{2}$ per cent (subsequently increased to 46 per cent) of the outstanding stock of the Southern Pacific Company. The stock is held for the Union Pacific Company by one of its proprietary companies, the Oregon Short Line Railroad Company. The government contends that the domination over and control of the Southern Pacific Company given to the Union Pacific Company by this purchase of stock brings the transaction within the terms of the anti-trust act. A large amount of testimony was taken and the case heard before four circuit judges of the eighth circuit, resulting in a decree dismissing the bill. 188 Fed. 102.

Prior to the stock purchase in 1901 the Union Pacific system may briefly be described as a line of railroad from the Missouri river to the Pacific coast; namely, from Omaha, Nebraska, or perhaps more strictly from Council Bluffs, Iowa; and from Kansas City, Missouri, to Ogden, Utah, and Portland Oregon, with various branches and connections and a line of steamships from Portland to San Francisco, California, and from Portland to the Orient; and a line of steamships from San Francisco to the Orient (the Occidental & Oriental Steamship Company), in which the Union Pacific and the Southern Pacific each owned a half interest. The main line from Council Bluffs to Ogden, a little over 1,000 miles in length, with the branch from Kansas City, through Denver, Colorado, to Cheyenne, Wyoming, on the main line, was owned and operated by the Union Pacific; the line from Granger, Wyoming, on the main line of the Union Pacific, to Huntington, Oregon, was owned and operated by the Oregon Short Line Railroad Company, the capital stock of which was owned by the Union Pacific; and the line from Huntington to Portland was owned

and operated by the Oregon Railroad & Navigation Company, the stock ownership of which was in the Oregon Short Line. The boat line from Portland to San Francisco and to the Orient, the Portland & Asiatic Steamship Company, was organized early in 1901, its stock being owned by the Oregon Railroad & Navigation Company.

The Southern Pacific Company, a holding company of the state of Kentucky, also engaged in operating certain lines of railroad under lease, controlled a line of railroad extending from New Orleans through Louisiana, Texas, New Mexico, Arizona, California, and Oregon to Portland, reaching Los Angeles and San Francisco, with several branch lines and connections extending into tributary territory. A line of boats running between New York and New Orleans was also owned and operated by the Southern Pacific, and later the same ships entered the port of Galveston, where also the Southern Pacific reached tidewater, and it had branches extending to various points in northern Texas, connecting with other lines of road. The Southern Pacific also operated, under lease, the railroad of the Central Pacific Railway Company, all the stock of which is owned by the Southern Pacific. The lines of the Central Pacific consisted of the road from San Francisco to Ogden, about 800 miles in length, and connecting at the latter place with the Union Pacific and the Denver & Rio Grande Railroad Company's line. It also had various branches in and about California, aggregating in mileage about 500 miles. The Southern Pacific also owned a majority of the stock of the Pacific Mail Steamship Company, which operated a line of steamships plying to ports in the Orient and running between San Francisco and Panama, which, with the Panama Railroad and its boats, constituted the so-called Panama Route.

The contention of the government is that, prior to the stock purchase, the Union Pacific and Southern Pacific were competing systems of railroad engaged in interstate commerce, and acted independently as to a large amount of such carrying trade, and that since the acquisition of the stock in question the dominating power of the Union Pacific has eliminated competition between these two systems, and that such domination makes the combination one in restraint of trade, within the meaning of the 1st section of the act of Congress of July 2,

1890, and the transaction an attempt to monopolize interstate trade within the provisions of the 2d section of the act.

In view of the recent consideration of the history and meaning of the act (Standard Oil and Tobacco Cases, 221 U. S. 1, 55 L. ed. 619, 34 L.R.A.(N.S.) 834, and 221 U. S. 106, 55 L. ed. 663), it would be superfluous to enter upon any general consideration of its origin and scope. In certain aspects the law has been thoroughly considered and its construction authoritatively settled, and in determining the present controversy we need but briefly restate some of the conclusions reached. The act applies to interstate railroads as carriers conducting interstate commerce, and one of the principal instrumentalities thereof. *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007; *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259. The act is intended to reach combinations and conspiracies which restrain freedom of action in interstate trade and commerce, and unduly suppress or restrict the play of competition in the conduct thereof. *United States v. Joint Traffic Asso.* *supra*. In that case an agreement between competing interstate railroads for the purpose of fixing and maintaining rates was condemned.

"It is," said the court (p. 571), "the combination of these large and powerful corporations, covering vast sections of territory, and influencing trade throughout the whole extent thereof, and acting as one body in all matters over which the combination extends, that constitutes the alleged evil, and in regard to which, so far as the combination operates upon and restrains interstate commerce, Congress has power to legislate and to prohibit."

In the *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. ed. 679, this court dealt with a combination differing in character from that considered in the *Trans-Missouri* and *Joint Traffic* Cases, and it was there held that the transfer to a holding company of the stock of two competing interstate railroads, thereby effectually destroying the power which had theretofore existed to compete in interstate commerce, was a restraint upon such commerce, and Mr. Justice HARLAN, announcing the affirmance of the decree of the circuit court, said (p. 337):

"In all the prior cases in this court the anti-trust act has

been construed as forbidding any combination which, by its necessary operation, destroys or restricts free competition among those engaged in interstate commerce; in other words, that to destroy or restrict free competition in interstate commerce was to restrain such commerce. Nor, can this court say that such a rule is prohibited by the Constitution, or is not one that Congress could appropriately prescribe when exerting its power under the commerce clause of the Constitution? Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine."

Mr. Justice BREWER, who delivered a concurring opinion, while expressing the view that the former cases were rightly decided, said that they went too far in giving the reasons for the judgments, and declared his view that Congress only intended to reach and destroy those contracts which were in direct restraint of trade, unreasonable, and against public policy. He was nevertheless emphatic in condemning the combination effected by the Northern Securities Company and the transfer of stocks to it, which policy, he declared, might be extended until a single corporation with stocks owned by three or four parties would be in practical control of both roads; or, viewing the possibilities of combination, the control of the whole transportation system of the country; and, in concluding his concurring opinion, said (p. 363):

"It must also be remembered that under present conditions a single railroad is, if not a legal, largely a practical, monopoly, and the arrangement by which the control of these two competing roads was merged in a single corporation broadens and extends such monopoly. I cannot look upon it as other than an unreasonable combination in restraint of interstate commerce—one in conflict with state law, and within the letter and spirit of the statute and the power of Congress."

Of the Sherman act and kindred statutes, this court, speaking by Mr. Justice McKENNA, said in *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 129, 49 L. ed. 689, 694:

"According to them, competition, not combination, should be the law of trade. If there is evil in this, it is accepted as less than that which may result from the unification of interest,

and the power such unification gives. And that legislatures may so ordain this court has decided. *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007; *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259; *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. ed. 679; *Swift & Co. v. United States*, 196 U. S. 375, 49 L. ed. 518."

In the recent discussion of the history and meaning of the act in the *Standard Oil* and *Tobacco Cases* this court declared that the statute should be given a reasonable construction, with a view to reaching those undue restraints of interstate trade which are intended to be prohibited and punished; and in those cases it is clearly stated that the decisions in the former cases had been made upon an application of that rule, and there was no suggestion that they had not been correctly decided. In the *Tobacco Case*, after referring to the previous decision in the *Standard Oil Case* and the decisions in the *Trans-Missouri* and *Joint Traffic Cases*, the doctrine was tersely summarized by the Chief Justice, speaking for the court, as follows (p 179):

"Applying the rule of reason to the construction of the statute, it was held in the *Standard Oil Case* that, as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the anti-trust act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition, or unduly obstructing the due course of trade, or which, either because of their inherent nature or effect, or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. In other words, it was held not that acts which the statute prohibited could be removed from the control of its prohibitions by a finding that they were reasonable, but that the duty to interpret which inevitably arose from the general character of the term 'restraint of trade' required that the words 'restraint of trade' should be given a meaning which would not destroy

the individual right to contract, and render difficult, if not impossible, any movement of trade in the channels of interstate commerce—the free movement of which it was the purpose of the statute to protect.”

We take it, therefore, that it may be regarded as settled, applying the statute as construed in the decisions of this court, that a combination which places railroads engaged in interstate commerce in such relation as to create a single dominating control in one corporation, whereby natural and existing competition in interstate commerce is unduly restricted or suppressed, is within the condemnation of the act. While the law may not be able to enforce competition, it can reach combinations which render competition impracticable. *Swift & Co. v. United States*, 196 U. S. 375, 49 L. ed. 518.

Nor do we think it can make any difference that instead of resorting to a holding company, as was done in the Northern Securities Case, the controlling interest in the stock of one corporation is transferred to the other. The domination and control, and the power to suppress competition, are acquired in the one case no less than in the other, and the resulting mischief, at which the statute was aimed, is equally effective whichever form is adopted. The statute in its terms embraces every contract or combination, in form of trust or otherwise, or conspiracy in restraint of trade or commerce. This court has repeatedly held this general phraseology embraces all forms of combination, old and new. “In view of the many new forms of contracts and combinations,” said the Chief Justice in the *Standard Oil Case* (p. 59), “which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation.” A more effectual form of combination to secure the control of a competing railroad than for one road to acquire a dominating stock interest in the other could hardly be conceived. If it is true, as contended by the government, that a stock interest sufficient for the purpose was obtained in the *Southern Pacific Company*, with a view to securing the control of that company and thus destroying or restricting competition with the *Union Pacific* in interstate

trade, the transaction was, in our opinion, within the terms of the statute.

That the purchase was legal in the state where made, and within corporate powers conferred by state authority, constitutes no defense, if it contravenes the provisions of the anti-trust act, enacted by Congress in the exercise of supreme authority over interstate commerce. *Northern Securities Co. v. United States*, 193 U. S. 334, 48, L. ed. 699; *Standard Oil Co. v. United States*, 221 U. S. 68, 55 L. ed. 648, 34 L.R.A.(N.S.) 834; *United States v. American Tobacco Co.* 221 U. S. 183, 55 L. ed. 695.

It is said, however, and this was the view of the majority of the circuit judges, that these railroads were not competing, but were engaged in a partnership in interstate carriage as connecting railroads; and it was further said that the Southern Pacific, because of its control of the line from Ogden to San Francisco and other California points, was the dominating partner. A large amount of the testimony in this voluminous record was given by railroad men of wide experience, business men and shippers, who, with practical unanimity, expressed the view that, prior to the stock purchase in question, Union Pacific and Southern Pacific systems were in competition, sharp, well-defined, and vigorous, for interstate trade. To compete is to strive for something which another is actively seeking and wishes to gain. The Southern Pacific, through its agents, advertisements, and literature, had undertaken to obtain transportation for its "Sunset" or southerly route across the continent, while the Union Pacific had endeavored in the same territory to have freight shipped by way of its own and connecting lines, thus securing for itself about 1,000 miles of the haul to the coast.

To preserve from undue restraint the free action of competition in interstate commerce was the purpose which controlled Congress in enacting this statute, and the courts should construe the law with a view to effecting the object of its enactment.

Competition between two such systems consists not only in making rates, which, so far as the shipper was concerned, the proof shows, were by agreement fixed at the same figure whichever route was used, and then apportioned among the connect-

ing carriers upon a basis satisfactory to themselves, but includes the character of the service rendered, the accommodation of the shipper in handling and caring for freight, and the prompt recognition and adjustment of the shipper's claims. Advantages in these respects were the subjects of representation and the basis of solicitation by many active, opposing agencies. The maintenance of these by the rival companies promoted their business and increased their revenues. The inducement to maintain these points of advantage—low rates, superiority of service and accommodation—did not remain the same in the hands of a single dominating and common ownership as it was when they were the subjects of active promotion by competing owners whose success depended upon their accomplishment.

The consolidation of two great competing systems of railroad engaged in interstate commerce by a transfer to one of a dominating stock interest in the other creates a combination which restrains interstate commerce within the meaning of the statute, because, in destroying or greatly abridging the free operation of competition theretofore existing, it tends to higher rates (*United States v. Joint Traffic Asso.* 171 U. S. 577, 43, L. ed. 290). It directly tends to less activity in furnishing the public with prompt and efficient service in carrying and handling freight and in carrying passengers, and in attention to and prompt adjustment of the demands of patrons for losses, and in these respects puts interstate commerce under restraint. Nor does it make any difference that rates for the time being may not be raised and much money be spent in improvements after the combination is effected. It is the scope of such combinations and their power to suppress or stifle competition or create monopoly which determines the applicability of the act. *Pearsall v. Great Northern R. Co.* 161 U. S. 646, 676, 40 L. ed. 838, 848; *United States v. Joint Traffic Asso.* *supra*.

It is urged that this competitive traffic was infinitesimal when compared with the gross amount of the business transacted by both roads, and so small as only to amount to that incidental restraint of trade which ought not to be held to be within the law; but we think the testimony amply shows that, while these roads did a great deal of business for which they did not compete, and that the competitive business was a com-

paratively small part of the sum total of all traffic, state and interstate, carried over them, nevertheless such competing traffic was large in volume, amounting to many millions of dollars. Before the transfer of the stock, this traffic was the subject of active competition between these systems; but by reason of the power arising from such transfer it has since been placed under a common control. It was by no means a negligible part, but a large and valuable part, of interstate commerce which was thus directly affected.

The fact that the Southern Pacific had a road of its own from the Gulf to the Pacific coast did not prevent competition for this traffic. The Union Pacific and its connections were engaged in the same carrying trade, and as a matter of fact were competing for that trade by all the usual means of competition resorted to by rival railroad systems. As this court said, speaking by Mr. Justice HOLMES, in *Swift & Co. v. United States*, 196 U. S. 398, 49 L. ed. 525: "Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business." That commerce, as conducted from the East to the Pacific coast, was, in a substantial part, the subject-matter of rivalry and competition between these two systems. Since the stock transfer the companies have common officers, and the rival soliciting agencies have been, for the most part, abandoned.

It is contended that the Union Pacific was but a connecting road and really had no line to San Francisco, but was dependent upon the Southern Pacific for such terms as it could make over the old Central Pacific line from Ogden to San Francisco. The facts disclose, as we have already said, that the Union Pacific had a line to Portland by way of the Oregon Short Line and the Oregon Railroad & Navigation Company, and thence to San Francisco by steamboat connection. It may be admitted that this was a much longer route than by way of the Ogden connection, and that, as a practical matter, nearly all of the freight intended for San Francisco and nearby points went over the Ogden route; nevertheless, the Portland route was a factor in rate making to the coast, and the testimony shows that the Union Pacific and the Southern Pacific, up to the time of the sale of the stock, had been working for many years under a satisfactory arrangement as to rates. It is going

too far to say that the Union Pacific was entirely at the mercy of the Southern Pacific in making rates for freight by way of the Ogden connection, because the latter company controlled the old Central Pacific line to San Francisco. It certainly would have been very detrimental to the Southern Pacific to have declined an arrangement for the carriage of freight received from the Union Pacific and its connections for transportation to California by way of the Ogden route. The traffic manager of the Southern Pacific testified that the division of the through rate from Omaha to San Francisco has been the same since 1870; that he thought it unfair to the Southern Pacific, but that it was the best that could be obtained at the time. One of the reasons for the Central Pacific leasing its lines to the Southern Pacific, as set forth in the lease, was that the Union Pacific had secured control of the Oregon Short Line, and thereby obtained an outlet to the Pacific, other than over the Central Pacific, "and thus in that respect placed itself in opposition to the interests of the Central Pacific," and that it was "not only to the best interests of, but absolutely necessary that, the Central Pacific Railroad Company, in order to maintain itself against these diversions (of the Union Pacific and others), should be operated in connection with a friendly through line to the waters of the Atlantic."

Nor do we think it can be justly said that, because of the connection with the Rio Grande road at Ogden, the Southern Pacific was in position to discriminate at will against the Union Pacific in such wise as to greatly impair the latter road's carrying trade upon eastbound freight. In this connection it is said that since the consolidation, notwithstanding the former published rates are maintained, the favoring attitude of the Southern Pacific to the Union Pacific practically destroyed the carrying trade from Ogden to the East for the Rio Grande system, and necessitated the construction by the latter road of a new connection for California points, and that such would have been the fate of the Union Pacific upon disagreement as to rates with the Southern Pacific. In reference to this point we think it is pertinent to consider the acts of Congress known as the Pacific Railroad acts. These acts required the two roads, the Central Pacific and Union Pacific, to be "operated and used for all purposes of communication,

travel, and transportation, so far as the public and government are concerned, as one connected, continuous line" (12 Stat. at L. 489, 495, act of July 1, 1862, § 12, chap. 120), and in such operation and use "to afford and secure to each equal advantages and facilities as to rates, time, and transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies or adverse to the road or business of any or either of the others. . . ." (31 Stat. at L. 356, 362, act of July 2, 1864, § 15, chap. 216). They also authorized the consolidation of the roads. These acts, it is said, are only intended to secure the permanent physical connection of the roads, and to provide for equal accommodations upon the basis of independent carriage, and outline no method by which the two roads can be compelled to make a joint through rate, and that at the time of the stock transfer there was no such provision in the interstate commerce acts. Therefore, it is said that the Union Pacific, no less than the Rio Grande, would have been practically at the mercy of the Southern Pacific in the favorable or unfavorable treatment which might have been accorded to it in the matter of through business to be transported eastwardly. The purpose of Congress to secure one permanent road to the coast, so far as physical continuity is concerned, is apparent; but we do not think the acts stop with that requirement. It is provided that facilities as to rates, time, and transportation shall be without any discrimination of any kind in favor of either of said companies, or adverse to the road or business of any or either of the others; and the purpose of Congress to secure a continuous line of road, operating from the Missouri river to the Pacific coast as one road, is further emphasized in the act of Congress of June 20, 1874 (18 Stat. at L. 111, chap. 331, U. S. Comp. Stat. 1901, p. 3577), making it an offense for any officer or agent of the companies authorized to construct the roads, or engaged in the operation thereof, to refuse to operate and use the same for all purposes of communication, travel, and transportation, so far as the public and government are concerned, as one continuous line, and making it a misdemeanor to refuse, in such operation and use, to afford and secure to each of said roads equal advantages and facilities as to rates, time, and transportation, without any discrimina-

tion of any kind in favor of or adverse to any or either of said companies. Such practices of systematic and preconcerted discrimination as are said to have destroyed the Rio Grande's carrying trade as a connection for the East for business at Ogden would have violated the statute as discriminations adverse to the Union Pacific, and be equally violative of the letter and spirit of the acts of Congress. Certainly such discriminations could be restrained by the courts (*Union P. R. Co. v. Chicago, R. I. & P. R. Co.* 163 U. S. 564, 603, 604, 41 L. ed. 265, 279), and might possibly have resulted in a forfeiture of all rights under the acts of Congress. The obligation to keep faith with the government continued, as did the legislative power of Congress concerning these roads, notwithstanding changed forms of ownership and organization. *Union P. R. Co. v. Mason City, & Ft. D. R. Co.* 199 U. S. 160, 50 L. ed. 134.

It is further contended that the real purpose in acquiring the stock was not to obtain the control of the Southern Pacific as a system, but to secure the California connection *via* Ogden, and to avoid the situation which has been termed the "bottling up" of the Union Pacific at that point. That process, we have undertaken to show, might have been detrimental to the Southern Pacific business in California, as it is apparent that much of it would not have gone over the "Sunset" route of the Southern Pacific. It may be conceded, as is undoubtedly the fact, that the connection at Ogden was a valuable one, the one practically and largely, if not exclusively, used in the transportation of freight to and from the state of California; but this case is not to be decided upon the theory that only so much of the Southern Pacific system as operates between Ogden and San Francisco has been acquired. Conceding for this purpose that it might have been legitimate, had it been practicable, to acquire the California connection at Ogden over the old Central Pacific line, we must consider what was in fact done; and that was the purchase of the controlling interest in the entire Southern Pacific system, consisting of ocean and river lines with a mileage of about 3,500 miles, and railroad lines aggregating over 8,000 miles, together forming a transportation system from New York and other Atlantic ports to San Francisco and Portland and other Pacific Coast points, with various branches and connections, besides a steam-

ship line from San Francisco to Panama and from San Francisco to the Orient, and a half interest in another line between the two latter points. The purchase may be judged by what it in fact accomplished, and the natural and probable consequences of that which was done. Because it would have been lawful to gain, by purchase or otherwise, an entrance into California over the old Central Pacific, does not render it legal to acquire the entire system, largely engaged in interstate commerce in competition with the purchasing road.

In determining the validity of this combination, we have a right to look also to the intent and purpose of those who conducted the transactions from which it arose, and to the objects had in view. (*Swift & Co. v. United States*, 196 U. S. 396, 49 L. ed. 524; *United States v. Terminal R. Asso.* 224 U. S. 383, 395, 56 L. ed. 810, 813.) It appears that at the time the Union Pacific was about to raise the means to effect the Southern Pacific stock purchase it authorized the issuance of \$100,000,000 of bonds "for the purpose of meeting present and future financial requirements of the company," provision being made for the use of the proceeds from \$40,000,000 of this amount in the purchase of the Southern Pacific stock, with no designation whatever as to the purpose to which the balance, \$60,000,000, should be applied. It is said that the remaining \$60,000,000 were intended to be used in the acquisition of a part interest in the railroad system of the Chicago, Burlington, & Quincy Railway Company, in view of the imminent probability of the purchase of that system by the Northern Pacific Railway Company and the Great Northern Railway Company. As a matter of fact, the Northern Pacific and Great Northern having each secured a half interest in the Burlington, the Union Pacific did acquire a large amount of the Northern Pacific stock with this \$60,000,000. The failure to secure control of the Northern Pacific by acquiring a majority of its common stock resulted in the formation of the Northern Securities Company, terminating in the litigation of the Northern Securities Case and the judgment of this court, reported in 193 U. S. 197, 48 L. ed. 679. When that combination was declared illegal, the Union Pacific interests undertook to compel a return of the Northern Pacific stock which they had turned over to the Northern Securities Company, and

opposed a distribution among the stockholders of the latter company of the stock of the Northern Pacific Company and the Great Northern Company, which had been put into the combination. That attempt was dealt with in *Harriman v. Northern Securities Co.* 197 U. S. 244, 49 L. ed. 739, and of the effect of the return of the Northern Pacific stock to the Union Pacific interests instead of the distribution of the stock and assets of the Northern Securities Company among its stockholders, this court said (p. 297):

“It is clear enough that the delivery to complainants of a majority of the total Northern Pacific stock, and a ratable distribution of the remaining assets to the other Securities stockholders, would not only be in itself inequitable, but would directly contravene the object of the Sherman law and the purposes of the government suit.

“The Northern Pacific system, taken in connection with the Burlington system, is competitive with the Union Pacific system, and it seems obvious to us, the entire record considered, that the decree sought by complainants would tend to smother that competition.”

In view of the testimony, we think the evident purpose of issuing the \$100,000,000 of bonds was to acquire a fund to be used for the acquisition of the stock of the Southern Pacific, a great competitive system, and also of the stocks of other competing roads.

After acquiring the Southern Pacific stock, Mr. Harriman, who dominated in the affairs of the Union Pacific, became president and chairman of the executive committee of the Southern Pacific Company, with the same ample power which he had in like positions in the Union Pacific Company and the companies owned and controlled by it. These facts cannot be lost sight of in determining the object and scope of the transaction in question, which resulted, as we have said, in that unified control which has in its power the suppression of competition.

But it is said that no such control was in fact obtained; that at no time did the Union Pacific acquire a majority of the stock of the Southern Pacific, and that at first it acquired but thirty-seven and a fraction per cent, which was afterwards somewhat increased and diminished until about 46 per cent of

the stock is now held. In any event, this stock did prove sufficient to obtain the control of the Southern Pacific. It may be true that in small corporations the holding of less than a majority of the stock would not amount to control, but the testimony in this case is ample to show that, distributed as the stock is among many stockholders, a compact, united ownership of 46 per cent is ample to control the operations of the corporation. This is frankly admitted in the testimony of Mr. Harriman, the prime mover in the purchase of the Southern Pacific. It was purchased, he declared, for the purpose of getting a dominating interest in the Southern Pacific Company, and, he added, the Union Pacific did thus acquire such interest.

Reaching the conclusion that the Union Pacific thus obtained the control of a competing railroad system and thereby effected a combination in restraint of trade, within the meaning of the Sherman act, the question remains, What should be the relief in such circumstances? The remedies provided in the statute, generally speaking, were said by this court in the *Standard Oil Case*, *supra*, to be twofold in character (p. 78):

"1st. To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute. 2d. The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about."

In applying this general rule of relief we must deal with each case as we find it; and in the present one the object to be attained is to restrain the operation of and effectually terminate the combination created by the transfer of the stock to the Union Pacific Company. In that view the decree to be entered in the district court shall provide an injunction against the right to vote this stock while in the ownership or control of the Union Pacific Company, or any corporation owned by it, or while held by any corporation or person for the Union Pacific Company, and forbid any transfer or disposition thereof in such wise as to continue its control, and shall provide an injunction against the payment of dividends upon such stock

while thus held, except to a receiver to be appointed by the district court to collect and hold such dividends until disposed of by the decree of the court.

As the court below dismissed the government's bill, it was unnecessary there to consider the disposition of the shares of stock acquired by the Union Pacific Company, which acquisition, we hold, constituted an unlawful combination in violation of the anti-trust act. In order to effectually conclude the operating force of the combination, such disposition shall be made subject to the approval and decree of the district court, and any plan for the disposition of this stock must be such as to effectually dissolve the unlawful combination thus created. The court shall proceed, upon the presentation of any plan, to hear the government and defendants, and may bring in any additional parties whose presence may be necessary to a final disposition of the stock in conformity to the views herein expressed.

As to the suggestion made at the oral argument by the Attorney General, in response to a query from the court as to the nature of the decree, that one might be entered which, while destroying the unlawful combination in so far as the Union Pacific secured control of the competing line of road extending from New Orleans and Galveston to San Francisco and Portland, would permit the Union Pacific to retain the Central Pacific connection from Ogden to San Francisco, and thereby to control that line to the coast, thus effecting such a continuity of the Union Pacific and Central Pacific from the Missouri river to San Francisco as was contemplated by the acts of Congress under which they were constructed, it should be said that nothing herein shall be considered as preventing the government or any party in interest, if so desiring, from presenting to the district court a plan for accomplishing this result, or as preventing it from adopting and giving effect to any such plan so presented.

Any plan or plans shall be presented to the district court within three months from the receipt of the mandate of this court; failing which, or, upon the rejection by the court of plans submitted within such time, the court shall proceed by receivership and sale, if necessary, to dispose of such stock in such wise as to dissolve such unlawful combination.

The government has appealed from the decree, which is a general one, dismissing the bill. So far as concerns the attempt to acquire the Northern Pacific stock and the stock of the Atchison, Topeka, & Santa Fe Railway Company, afterwards abandoned, and a certain interest in the San Pedro, Los Angeles, & Salt Lake Railroad Company, and other features of the case which were dealt with and disposed of by the decree and opinion of the court below, it is sufficient, without going into these matters in detail, to say that as to them we find no reason to disturb the action of the court below, but for the reasons stated the decree should be reversed, and one entered in conformity to the views herein expressed, so far as concerns the acquisition of the Southern Pacific stock.

Reversed in part, the District Court to retain its jurisdiction to see that the decree above outlined is made effectual.

Mr. Justice VAN DEVANTER took no part in the hearing or determination of this case.

On a motion as to the form of the mandate Mr. Justice DAY delivered the opinion of the court as follows:

On December 2, 1912, this court handed down an opinion and remanded this case to the district court of the United States, whence it came, with instructions to enter a decree which would provide an injunction as to voting the stock of the Southern Pacific Company, acquired by the Union Pacific Railroad Company, and directed the court to further hear the parties in order to make a decree effectually concluding the operating force of the combination created by the purchase of the Southern Pacific Company's stock. The parties were given three months from the receipt of the mandate of this court by the district court to propose plans, and it was directed that any one adopted by the court should be such as would effectually dissolve the unlawful combination.

The mandate of this court not having issued, on December 19, 1912, a motion was made in which the Attorney General of the United States and counsel for the appellees the Union Pacific Railroad Company and the Oregon Short Line Railroad Company (the latter holding the stock for the Union Pacific Company) joined in asking this court "to instruct the United States district court for the district of Utah, by a provision

incorporated in the mandate of this court, when issued, or otherwise, whether or not a sale of the Southern Pacific Company shares held by said appellees, to the shareholders of appellee Union Pacific Railroad Company, substantially in proportion to their respective holdings, or a distribution thereof by dividend to the Union Pacific stockholders entitled to such dividend, would, in the opinion of this court, constitute a disposition of said shares in compliance with the opinion herein filed on December 2, 1912."

In pursuance of the request thus preferred by the United States and the appellees named, it becomes necessary now to determine whether the distribution or sale proposed of the Southern Pacific Company's shares will comply with the decree ordered to be entered by the former opinion of this court.

The Southern Pacific Company's stock, held by the Oregon Short Line Company for the Union Pacific Company, amounts to \$126,650,000, par value, in shares of \$100 each, and constitutes 46 per cent of the Southern Pacific Company's stock; enough, as we have heretofore found, to effectually control the Southern Pacific Company. As stated by the appellees, the Union Pacific Company has outstanding \$99,569,300, par value, of preferred stock, and \$216,646,300, par value, of common stock, all in shares of \$100 each, amounting in all to \$316,215,600, and also has outstanding \$37,000,000 of bonds convertible into stock, and the appellees further state that its stock is distributed among over 22,000 holders.

It is contended on behalf of the appellees that the distribution of the Southern Pacific Company's stock, held, as we have stated, by the Oregon Short Line Company for the Union Pacific Company, among so many stockholders, will effectually conclude the combination decreed to be ended by the former order of the court. It is insisted that such distribution will prevent the continued operation of the combination for the control of the Southern Pacific Company by a competing company, which the Union Pacific Company was found to be, and that it is authorized under the practice in respect to such decrees, as settled by the previous decisions of this court in affirming the decree of the circuit court in *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. ed. 679, and *Harriman v. Northern Securities Co.*, 197 U. S. 244, 49 L. ed. 739, and

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the decree of the Circuit Court in *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912 D, 734.

In the *Northern Securities Co. Case*, after providing for orders of injunction to prevent the continued operation of the Northern Securities Company, which controlled the Northern Pacific Railway Company and the Great Northern Railway Company, it was provided (p. 355):

"But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the [stockholders of the] Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said the Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies." [193 U. S. 355, 48 L. ed. 707.]

Upon the affirmation of this decree by this court in 193 U. S. 197, the Northern Securities Company proceeded to reduce its outstanding capital stock from \$395,400,000 to \$3,954,000, providing for such reduction by requiring each holder to surrender to the company for retirement 99 per cent of the shares held by him, and upon surrender by a stockholder the company assigned and transferred to him proportionate amounts of the stock of the Northern Pacific Company and Great Northern Company, which had been placed with the Northern Securities Company, the holding company, for the purpose of creating the combination, which the court had held to be illegal, and this plan of distribution was approved by this court in 197 U. S. 244, 49 L. ed. 739. In other words, the stock of the holding company was reduced and the surplus of assets created by such reduction, the stock of the Northern Pacific Company and the Great Northern Company, was distributed among the

stockholders of the Northern Securities Company, thereby effectually ending the combination.

In the Standard Oil Co. Case the majority of the stock of nineteen oil companies had been placed in the control of a holding company, the Standard Oil Company of New Jersey, with a capital stock of \$100,000,000, the stock of the latter corporation being issued to the holders of the stock in the nineteen companies in exchange for their stock. This holding company was held to be a combination and conspiracy in restraint of trade and commerce, and, after awarding injunctions, it was provided:

“But the defendants are not prohibited by this decree from distributing ratably to the shareholders of the principal company the shares to which they are equitably entitled in the stocks of the defendant corporations that are parties to the combination.” [173 Fed. 199.]

It is evident in that case, as in the Northern Securities Co. Case, that the distribution of the shares and stocks of the subsidiary companies, parties to the combination, among the shareholders of the Standard Oil Company of New Jersey, was to end the combination which had been decreed to be in violation of law, and prevent the continued control of the subsidiary companies by the holding company.

As was said in the opinion filed in this case, however, each case under the Sherman act [26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200] must stand upon its own facts; and we are unable to regard the decrees in the Northern Securities Co. Case and the Standard Oil Co. Case as precedents to be followed now, in view of the different situation presented for consideration.

The Southern Pacific Company's stock was mainly purchased from private parties, legatees of the Huntington estate, and it is evident that it is impossible to restore the *status quo* by the return of such stock to the persons from whom it was purchased upon such vendors refunding the purchase money.

The plan proposed in the present motion, of distributing the stock among the shareholders of the Union Pacific Company, or of selling it to such shareholders, will, in effect, transfer the stock from the Oregon Short Line Company, which now holds it for the Union Pacific Company, to the stockholders of the

latter company, who own and control that company. Upon the face of it, this would seem to be a proposition to perpetuate the domination and control of the Union Pacific Company over the Southern Pacific Company, because of the power given to the Union Pacific Company's stockholders to choose the directors of the Southern Pacific Company. The ultimate determination of the affairs of a corporation rests with its stockholders, and arises from their power to choose the governing board of directors. Unless otherwise provided by law, the stockholders may authorize the board of directors to delegate to an executive committee the authority to do any and all acts which the directors are authorized to do. The executive committee thus derives its authority from the stockholders through the board of directors. *Union P. R. Co. v. Chicago, R. I. & P. R. Co.* 163 U. S. 564, 597, 41 L. ed. 265, 276. In the present case the record discloses this mode of management of both the Southern Pacific Company and the Union Pacific Company, and, since 1905, as the proof shows, a majority of both executive committees consisted of the same persons, and Mr. Harriman was chairman of both committees.

It is contended for the appellees, however, that, in view of the great number of widely scattered stockholders of the Union Pacific Company, there is no probability of their acting together to continue the control of the Union Pacific Company over the Southern Pacific Company. Indeed, this is said to be impossible. But we are unable to accede to this contention. Bearing in mind the object of the statute to end such combinations and the duty of the courts in dealing with them to make such decrees as will most thoroughly effectuate that purpose, it is not consistent with that end to order such distribution of the stock as may fail to discontinue the control denounced, and as in all probability will fail to efficiently enforce the statute. It is by no means improbable, but quite likely, that, if the stock was transferred to the stockholders of the Union Pacific Company by distribution among them, the large stockholders could, by purchases and transfers of the stock, get into their own hands the power of choosing directors of both companies, and thus, though in a different manner, the Southern Pacific Company would continue to be in the practical control of the Union Pacific Company, which has been

found to be a rival and competing company within the meaning of the law. So of the privilege of sale to the stockholders in proportion to the amount of their holdings.

In considering these questions we must bear in mind not only the number of stockholders, but the character of the distribution of the stock among them. In the brief and exhibits of the appellees, filed with this motion, it is shown that of the 22,150 stockholders of the Union Pacific Company, 68, owning 5,000 or more shares each, hold together \$139,782,700 of the stock, and 300 others, owning from 1,000 to 5,000 shares each, hold together \$59,020,700 of the stock, and that the two groups (comprising 368 stockholders) hold \$198,843,400, or 62.8 per cent of the stock, while the remaining stockholders (21,782) control only \$117,412,200 of the stock. Many small shareholders might not wish to purchase the Southern Pacific Company's stock, and the privilege might be readily acquired from them by the larger and more active interests vested in the hands of the large stockholders, and thus again the condition forbidden be created and perpetuated.

The main purpose of the act is to forbid combinations and conspiracies in undue restraint of trade or tending to monopolize it, and the object of proceedings of this character is to decree, by as effectual means as a court may, the end of such unlawful combinations and conspiracies. So far as is consistent with this purpose a court of equity, dealing with such combinations, should conserve the property interests involved, but never in such wise as to sacrifice the object and purpose of the statute. The decree of the courts must be faithfully executed, and no form of dissolution be permitted that, in substance or effect, amounts to restoring the combination which it was the purpose of the decree to terminate.

In rejecting the plan for the transfer of the Southern Pacific Company's stock held for the Union Pacific Company, either by distribution or sale to the stockholders of the Union Pacific Company, we do not mean to preclude the district court from considering and acting upon plans which may be submitted to it under the former opinion and decree of the court. We are of opinion, however, and now hold, that the proposed plan of disposition of the entire stock holding of the Union Pacific Company in the Southern Pacific Company by transfer to the

stockholders of the Union Pacific Company will not so effectually end the combination as to comply with the decree heretofore ordered by this court to be entered.

So ordered.

Mr. Justice VAN DEVANTER took no part in the hearing or determination of this motion.

UNITED STATES v. READING COMPANY
 TEMPLE IRON COMPANY v. UNITED STATES
 READING COMPANY v. UNITED STATES

(Supreme Court of United States, 1912. 226 U. S. 324.)

MR. JUSTICE LURTON²⁰ delivered the opinion of the court:

This is a petition in equity, filed by the United States in the circuit court of the United States for the eastern district of Pennsylvania, for the purpose of enforcing the provisions of the act of July 2, 1890 [26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200], known as the Sherman anti-trust act, against an alleged combination of railroad and coal-mining companies formed and continued for the purpose of restraining competition in the production, sale, and transportation of anthracite coal in commerce among the states.

The defendants originally made such, and alone referred to hereafter as the defendants, were the following:

The Philadelphia & Reading Railway Company; the Philadelphia & Reading Coal & Iron Company; the Lehigh Valley Railroad Company; the Lehigh Valley Coal Company; the Delaware, Lackawanna & Western Railroad Company; the Central Railroad Company of New Jersey; the Erie Railroad Company; the New York, Susquehanna, & Western Railroad Company; the New York, Susquehanna, & Western Coal Company; the Lehigh & Wilkesbarre Coal Company; the Pennsylvania Coal Company; the Hillside Coal Company; the Reading Company; and the Temple Iron Company. By an amendment certain other defendants were brought in, consisting of holders

²⁰—Only the opinion of the court is given.

of contracts made by independent operators of coal mines, and trustees holding securities which might be affected by the relief sought against the carrier and coal-mining companies, the original defendants. A list of these later defendants is set out in the margin,^{20a} and when they are referred to herein they will be specifically mentioned.

The bill alleges that anthracite coal is an article of prime necessity as a fuel, and finds its market mainly in the New England and middle Atlantic states. The deposits of the coal, with unimportant exceptions, lie in the state of Pennsylvania, but do not occupy a continuous field, though found in certain counties adjoining in the eastern half of the state, and embrace an area of 484 square miles. This coal region is from 150 to 250 miles from tide water. The region itself is broken and mountainous, and the natural conditions and character of the deposits are such that the mining and reduction of the coal to suitable sizes for domestic use require very large amounts of capital. Its value commercially is dependent, in a large degree, upon quick and cheap transportation to convenient shipping points at tide water, from whence it may be distributed to the great consuming markets of the Atlantic coast states.

The whole problem of advantageously developing these deposits and supplying the eastern demand for fuel was one

20a—The Delaware & Hudson Company; Elk Hill Coal & Iron Company; St. Clair Coal Company; Enterprise Coal Company; Buck Run Coal Company; Llewellyn Mining Company; Clear Spring Coal Company; Pancoast Coal Company; Price-Pancoast Coal Company; Mount Lookout Coal Company; People's Coal Company; George F. Lee Coal Company; North End Coal Company; Melville Coal Company; Parrish Coal Company; Red Ash Coal Company; Raub Coal Company; Mid Valley Coal Company; Austin Coal Company; Clarence Coal Company; Nay Aug Coal Company; Green Ridge Coal Company; Excelsior Coal Company; Lackawan-

na Coal Company; Dolph Coal Company, Limited; Mary F. W. Howe, Frank Pardee, and Sarah Drexel Van Rensselaer, constituting A. Pardee & Company; Lafayette Lentz, William O. Lentz, and Lewis A. Riley, constituting Lentz & Company; William Law and John M. Robertson, constituting Robertson & Law; Richard White, W. R. Me-Turk, and Robert White, constituting E. White Company; Joseph J. Jermyn, George B. Jermyn, Emma J. Jermyn, constituting John Jermyn Estate; Joseph J. Jermyn, Michael F. Dolphin; the Pennsylvania Company for Insurance on Lives and Granting Annuities; and the Mercantile Trust Company.

which presented enormous difficulties. From an early day it has been the settled policy of the state of Pennsylvania to encourage the development of this coal region by canal and railroad construction, which would furnish transportation to convenient shipping points at tidewater. One of the defendant carriers, the Delaware, Lackawanna, & Western Company was given the power to acquire coal lands and engage in the business of mining and selling coal in addition to the business of a common carrier, and all railroad companies were permitted to aid in the production of coal by assisting coal mining companies through the purchase of capital stock and bonds. Thus, it has come about that the defendant carriers not only dominate the transportation of coal from this anthracite region to the great distributing ports at New York harbor, but also through their controlled coal-producing companies, produce and sell about 75 per cent of the annual supply of anthracite. As a further direct consequence of the state authorized between coal-producing and coal-transporting companies, it has come about that the defendant carrier companies and the coal-mining companies affiliated with the carrier companies now own or control about 90 per cent of the entire unmined area of anthracite, distributed, according to the averments of the petition, as follows:

Reading Company	44.	per cent
Lehigh Valley Company.....	16.87	per cent
Del. L. & Western Company.....	6.55	per cent
Cent. Railroad of New Jersey.....	19.	per cent
Erie Railroad	2.59	per cent
N. Y. S. & Western Railroad.....	.54	per cent
		89.55 per cent

It further appears that, in addition to the great coal-mining companies subsidiary to one or another of the defendant carrier companies, there are a large number of independent coal operators whose aggregate production from coal lands, in part leased from the railroad companies or the railroad controlled coal-producing companies, amounts to about 20 per cent of the annual anthracite supply. These independent operators are

said to no longer have the power to compete with the carrier defendants and their subsidiary coal companies, because a large proportion of them have severally entered into contracts with one or the other of the carrier or coal-mining companies defendant for the sale of the entire product of their mines for the consideration of 65 per cent of the average market price at tide water.

Thus, there exists, independently of any agreement, combination, or contract between the several defendant carrier companies for the purpose of suppressing competition among them, this condition:

First: Excluding two carrier companies not made defendants, which reach but a limited number of collieries,—the Pennsylvania Railroad Company and the New York, Ontario, & Western Railroad Company,—the six carrier companies who are defendants are shown to control the only means of transportation between this great anthracite deposit and tide water, from whence the product may be distributed by rail and water to the great consuming markets of the Atlantic coast states.

Second: These carriers and their subsidiary coal-mining and selling companies produce and sell about 75 per cent of the total annual supply of anthracite coal. Of the remainder, the independent operators mentioned above produce about 20 per cent.

The chief significance of the fact that the six carrier defendants control substantially the only means for the transportation of coal from the mines to distributing points at tide water is in the fact that they, collectively, also control nearly three fourths of the annual supply of anthracite which there finds a market. The situation is therefore one which invites concerted action and makes exceedingly easy the accomplishment of any purpose to dominate the supply and control the prices at seaboard. The one fourth of the total annual supply which comes from independent operators in the same region has been sold in competition with the larger supply of the defendants. If, by concert of action, that source of competition be removed, the monopoly which the defendants, acting together, may exert over production and sale, will be complete.

1008 COMBINATIONS AND RESTRAINT OF TRADE

This bill avers that the defendants have combined for the purpose of securing their collective grip upon the anthracite coal supply by exerting their activities to shut out from the district any new line of transportation from the mines to tide water points, and to shut out from competition at tide water the coal of independent operators with their own coal. The steps said to have been taken having this end in view, we shall now consider:

The community of interest which has resulted from the charter powers of the carrier companies to directly or indirectly engage in the business of mining and selling coal has produced the relation between the carrier and coal-mining defendants shown by the several groups into which we have arranged them, thus:

1. The Reading Company is a Pennsylvania corporation, and apparently nothing more than a holding company. That company holds:

- a. The entire capital stock of the Philadelphia & Reading Railway, one of the defendant carriers.

- b. The entire capital stock of the Philadelphia & Reading Coal & Iron Company, a coal-mining company.

The three companies have the same president.

2. The Lehigh Valley Railroad Company owns all of the capital stock of the Lehigh Valley Coal Company, and the two companies have the same president.

3. The Central Railroad of New Jersey owns 90 per cent of the capital stock of the Lehigh & Wilkesbarre Coal Company, and the two companies have the same president, who is also the president of the Reading Company and its two controlled companies.

4. The Erie Railroad Company owns all of the capital stock of the Pennsylvania Coal Company and a large majority of the stock of the Hillside Coal Company, and the three companies have the same president.

5. The New York, Susquehanna, & Western Railroad Company owns nearly the entire capital stock of the New York, Susquehanna, & Western Coal Company, and they have the same president, who is also the president of the Erie Railroad Company and of its two allied coal companies mentioned above.

6. The Delaware, Lackawanna, & Western Railroad Company is itself an owner and producer of anthracite, and seems to have no subsidiary coal company.

7. The Temple Iron Company. The relation of this company to the several carrier companies will be considered separately.

Excluding the Temple Iron Company, the groups as arranged are independent of each other, and each group, in the absence of any agreement or combination, possesses the power to compete with every other in the production, sale, and transportation of coal from the mines to tide water. Indeed, the plain averment of the bill is that, prior to 1896, they were actually competing in the market reached at New York harbor, and that the competition continued, except as interrupted by abortive or abandoned efforts to combine, until they entered into the general combination which it is the purpose of this proceeding to dissolve.

That the Delaware, Lackawanna, & Western Railroad Company was itself the owner of coal lands, and was engaged in mining, transporting, and marketing its own coal, and that the other railway defendants were also engaged, through their subsidiary coal companies, in mining and selling coal, as well as in transporting the coal so mined, is not determinative of any issue here presented, since this bill was filed before the commodities clause of the Hepburn act of June 29, 1906 [34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1288], became effective, which forbids any carrier engaged in interstate transportation from transporting coal for market, when the coal at the time of transportation is owned by the carrier company. See *United States ex rel. Atty. Gen. v. Delaware, & H. R. Co.* 213 U. S. 366, 53 L. ed. 836. Any relief against a continuance of such forbidden transportation must therefore be sought in another proceeding based upon the act of Congress referred to.

THE SCOPE AND THEORY OF THE BILL

The theory upon which the bill is framed and upon which the case has been presented by counsel is, that there exists between the defendants a *general combination* to control the

anthracite coal industry, both in respect of mining and transportation from the mines to the general consuming markets reached from shipping points at New York harbor, and the production and sale of coal throughout the United States.

The contention is that this *general combination* is established, first, by evidence of an agreement between the carrier defendants to apportion between themselves the total coal tonnage transported from the mines to tide water according to a scale of percentages; second, by a combination between them, through the instrumentality of the defendant, the Temple Iron Company, to prevent the construction of a new and competing line of railroad from the mines to tide water; third, by a combination between the defendants by means of a series of identical contracts for the control of the coal produced by independent coal operators, thereby preventing competition in the markets of other states between the coal of such independent operators and that produced by the defendants; and, finally, by certain so-called contributory combinations, already referred to, between some, but not all, of the defendants.

Aside from the particular transactions averred as "steps" or "acts in furtherance" of a presupposed *general combination*, the charge of such a combination is general and indefinite.

The case is barren of documentary evidence of solidarity. The fact of such general combination, if it exists, must be deduced from specific acts or transactions in which the companies have united and from which such general combination may be inferred. When and how did such a combination come about? We start with the proposition that if any such combination exists, it had an origin not earlier than 1896. Attempts to bring about a suppression of competition prior to that time, indicated by some of the evidence, had either proved abortive or had been abandoned. Thus, it is stated that in 1890 and 1891 the price of coal of certain sizes at tide water was from \$3.71 to \$3.85 per ton; that in 1892 the Philadelphia & Reading Railroad Company, the predecessor in title of the defendant the Philadelphia & Reading Railway Company, leased the lines of the Lehigh Valley Railroad Company and of the Central Railroad Company of New Jersey for nine hundred and ninety-nine years, and that the three companies together owned or controlled about 80 per cent of the coal

deposits of this anthracite region and transported nearly 50 per cent of the entire tonnage; that while these leases were in force the price of coal was advanced to \$4.15 and \$4.19 per ton for the same sizes. It is then averred that in a proceeding in the courts of New Jersey these leases of the Central Railroad Company of New Jersey were held null and void, and that in 1893 this decree was followed by a rescission of the lease of the Lehigh Valley Railroad Company to the Philadelphia & Reading Railroad Company. It is then averred that, under the influence of competition thereby restored, the price of the same grade of coal in 1894 fell to \$3.60 per ton and in 1895 to \$3.12 per ton. "*Whereupon*," the petition avers, in violation of the provisions of §§ 1 and 2, respectively, of the act of Congress of July 2, 1890, . . . the defendants the Reading Company and the defendant carriers and the defendant coal companies, owning or controlling 90 per cent, more or less, of all the anthracite deposits, and producing 75 per cent, more or less, of the annual supply of anthracite, and controlling all the means of transportation between the anthracite mines and tide water, save the railroads operated by the Pennsylvania Railroad Company and the New York, Ontario & Western Railroad Company, which, as aforesaid, reach only a limited number of collieries (not defendants here), entered into an agreement, scheme, combination, or conspiracy, by virtue whereof they acquired the power to control, regulate, restrain, and monopolize, and have controlled, regulated, restrained, and monopolized, not only the production of anthracite coal, but its transportation from the mines in Pennsylvania to market points in other states, and its prices and sale throughout the several states, with the result that competition in the transportation and sale of anthracite has been wholly suppressed and the price thereof greatly enhanced."

1. We come first to the evidence relied upon to show such a general combination through an agreement between the carriers to distribute the total tonnage of coal from this region to shipping points at New York harbor according to a scale of percentages spoken of as the "presidents' percentages."

There is some evidence tending to show that early in 1896

there was an effort made at a conference of the presidents of the carrier companies to distribute the coal tonnage between the several carriers, based upon the average percentage of coal carried in prior years by each carrier. The limited character of the coal field, the control of so large a proportion of the deposits and of the transportation, was such as to invite agreements and combinations. A pooling arrangement would largely prevent competition between the otherwise independent groups of carriers and producers. That any such pooling agreement was made is denied most earnestly by all of the defendants. That there occurred a conference in 1896 looking to such an arrangement seems probable on the evidence. But the weight of proof satisfies us that whatever might have been contemplated or attempted, the scheme proved abortive, or, if attempted, was abandoned long before this bill was filed. We do not set out the circumstances which are pointed out as tending to show such an illegal agreement, nor do we deem it necessary to discuss the conflicting direct testimony. We have gone through the record. The facts are discussed and largely set out in the opinion of the court below. Though its judges differed in respect to the relief which might be granted upon other grounds, they agreed in holding that the government had failed to show any contract or agreement for the distribution of tonnage. In this we concur.

THE TEMPLE IRON COMPANY COMBINATION

2. We come, then, to the several acts, agreements, or transactions set out in the seventh paragraph of the bill, two of which are said to have been participated in by all of the defendants, and therefore to constitute evidence of the general combination charged, and to be, in and of themselves, illegal combinations between all of the principal defendants which come under the frame of the bill as in violation of the act of July 2, 1890.

The transactions referred to are introduced immediately following the general charge, and are characterized in the bill as "steps in the development of this illegal combination, and in furtherance of its illegal purposes." It is then averred, that "the defendants, or some of them, became parties to the

following additional acts, schemes, and contracts, among others, in violation of the aforesaid act of July 2, 1890." This is followed by five distinct paragraphs, each setting out some distinct contract, combination, or agreement alleged to have been the act of all of the defendants, or of two or some number less than all. These alleged "steps" and "additional acts, schemes, and contracts," in violation of the Sherman law and in furtherance of the alleged illegal general scheme or purpose,—are: (a) the making of the 65 per cent contracts with the independent operators; (b) the absorption by the Erie Railroad of the New York, Susquehanna & Western Railroad Company; (c) the acquisition by the Reading Company of the majority of the capital stock of the Central Railroad of New Jersey; (d) the acquisition of the Temple Iron Company, and through it of a large number of collieries, for the purpose of defeating a projected independent line of railway into the coal region; and (e) the acquisition by the Erie Railroad Company, while controlling the Hillside Coal & Iron Company, of all of the shares of the Delaware Valley & Kingston Railroad Company, a projected common carrier, and all of the shares of the Pennsylvania Coal Company.

As we have already stated, two of these transactions are averred to be transactions into which all of the defendants entered in pursuance of a common purpose and general design to suppress competition and restrain commerce in coal between the states.

The first which we shall consider is the alleged combination through the Temple Iron Company. Concerning this, the petition, in substance, states, that in 1898 many of the independent coal operators in the Wyoming or northern field became dissatisfied with the transportation and market conditions under which they were obliged to conduct their collieries. Many contracts for the sale of their coal to the defendant coal companies had expired or were about to expire, and they demanded either lower freight rates or better prices from the coal companies. A competing line of railway from the northern or Wyoming zone of the anthracite region to a point on the Delaware river, where connection would be made with two or more lines extending to shipping points at New York harbor, was projected as a means of relieving the situation. The New York,

Wyoming & Western Railroad was accordingly incorporated. Large subscriptions of stock were taken, the line in part surveyed, parts of the right-of-way procured, and a large quantity of steel rails contracted for. As the road was to be mainly a coal-carrying road, support from coal-mining companies was essential. Its chief backing came from independent coal operators. The most important and influential of them was the firm of Simpson & Watkins, who controlled and operated eight collieries in the region, having an annual output of more than a million tons. The time for such a competing means of transportation was auspicious. Much of the output of the district not tied up by contracts of sale or transportation was pledged to this project and much more was promised.

The petition alleges that the construction of the projected independent railroad would not only have introduced competition into the transportation of anthracite coal to tide water, but it would have enabled independent operators reached by it to sell their coal at distributing points in free competition with the defendant coal companies. "*Wherefore*," avers the pleading, "the defendants the Reading Company, owning the entire capital stock of the Philadelphia & Reading Railway Company, and the other carrier companies defendants herein, controlling collectively all means of transportation between the mines and shipping points at New York harbor, combined together for the purpose of shutting out the proposed railroad, and preventing competition with them in the transportation of coal from the mines to other states, and the sale of coal in competition with their own controlled coal in the markets of other states." The plan devised was to detach from the enterprise the powerful support of Simpson & Watkins and the great tonnage which their co-operation would give to the new road, by acquiring for the combination the coal properties and collieries controlled by that great independent firm of operators. This would not only strangle the project, but secure them forever against new schemes induced by the large tonnage produced by these eight collieries, and secure not only that tonnage for their own lines, but keep the coal forever out of competition with that of their controlled coal-producing companies.

The scheme was worked out with the result foreseen and

intended. The capital stock of the Temple Iron Company, aggregating only \$240,000, was all secured. That company was then operating a small iron furnace near Reading. Its assets were small, but its charter was a special legislative charter which gave it power to engage in almost any sort of business, and to increase its capital substantially at will. Control of that company having been secured, it was used as the instrument for the purpose intended.

The plan by which the defendant carriers were enabled to carry out this scheme and apportion among themselves proportionate interests in the property acquired and the burden to be assumed was not simple, but elaborate. The financial arrangements seem to have been made through Mr. Baer, who was the president of and a large stockholder in the Temple Company, and Mr. R. J. Bacon, of the firm of J. P. Morgan & Company. Shortly stated, it was this: The Temple Company increased its capital stock to \$2,500,000 and issued mortgage bonds aggregating \$3,500,000. Simpson & Watkins agreed to sell to the Temple Company their properties for something near \$5,000,000. They accordingly transferred to the Temple Company the capital shares in the several coal companies, holding the title to their eight collieries, and received in exchange \$2,260,000 in the shares of the Temple Company, and \$3,500,000 of its mortgage bonds. By contemporaneous instruments Simpson & Watkins transferred to the defendant the Guaranty Trust Company of New York, as trustee, this capital stock and \$2,100,000 of the bonds of the Temple Company, and received from the Guaranty Company, \$3,238,396.66 in money and \$1,000,000 in certificates of beneficial interest in the stock of the Temple Company. The Guaranty Company seems to have been but a medium and was accordingly protected by a contemporaneous contract with the Reading Company and the other carrier defendants by which they severally contracted with the Guaranty Company to purchase the Temple Company's capital stock in a certain agreed proportion or percentage of the total capital stock, and to guarantee the bonded debt of the Temple Company in the same proportion. A large proportion of the bonds and of the beneficial certificates of interest in stock of the Temple Company was later guaranteed, or underwritten, as the stock phrase goes, by a syndicate including J. P.

Morgan, William Rockefeller, the Guaranty Company, and others.

Thus it came about that when this bill was filed the stock of the Temple Company, which, as seen, is a mere holding company for the several defendant carrier companies, was owned by the defendants, and the obligations of that company were guaranteed by them in proportions based on the percentage of the total anthracite tonnage carried annually by each of the defendant carriers, namely: The Reading Company and the Reading Railway Company, being treated as one and the same in this matter, 29.96 per cent; the Lehigh Valley Railroad Company, 22.88 per cent; the Central Railroad of New Jersey, 17.12 per cent; the Delaware, Lackawanna, & Western Railroad Company, 19.52 per cent; the Erie Railroad Company, 5.84 per cent; the New York, Susquehanna, & Western Railroad Company, 4.86 per cent. At the time this proof was taken the average annual output of the collieries thus acquired was about 1,600,000 tons, and in the last year the output had risen to 1,950,000 tons. This combination of the defendants through the Temple Iron Company was effective in bringing about the desired result. The New York, Wyoming, & Western Railroad Company was successfully strangled, and the monopoly of transportation collectively held by the six defendant carrier companies was maintained.

The projected competing railroad was undoubtedly a good faith proposition, and held out promise to independent coal operators not only of the prospect of competition in transportation from the mines to tide water, but the possibility of selling their coal either to the controlled coal companies defendant at better prices, or to the consuming public at tide water in competition with that of the controlled coal companies. But if we assume that its construction was doubtful, the result must be the same as characterizing the purpose and design of the concerted action of the defendants. They were so far convinced of the threatening character of the enterprise that they were moved at great cost to thwart it and at the same time remove the temptation for like competition by securing to themselves forever the product of the collieries named.

That the collieries to be reached by the new road were not all reached by each of the defendants is true. The great bulk

of tonnage from them seems to have been carried by the Erie, the Lehigh, and the Lackawanna. But the preservation of the monopoly of transportation from the mines to tide water held by the six lines which were serving the region was plainly a common interest,—a collective monopoly by which the profits in coal could be secured and the monopoly maintained by shutting out any new line to tidewater. The extent of the interest of each in the desired result seems to have been estimated by themselves as fairly measured by the percentage of the total tonnage theretofore carried annually by each. Thus it was that they became owners of the shares in the Temple Company, and guarantors of its obligations in the same proportions.

It has been suggested that since the New York, Wyoming, & Western Railroad has been effectively strangled that it will be idle to enjoin the doing of an act already accomplished. But that is a narrow view of the relief which may be granted under the statute and the frame of this bill.

The combination by means of the Temple Company still exists. It has been and still is an efficient agency for the collective activities of the defendant carriers for the purpose of preventing competition in the transportation and sale of coal in other states.

That under the law of Pennsylvania each of the defendant carrier companies has the power to acquire and hold the stock of coal-producing companies may be true. That the Temple Company may, under the same law, have the power to acquire and hold the capital stock of the Simpson & Watkins' collieries may also be conceded. But if the defendant carriers did, as we have found to be the fact, combine to restrain the freedom of interstate commerce either in the transportation or in the sale of anthracite coal in the markets of other states, and adopted as a means for that purpose the Temple Company, and, through it, the control of the great Simpson & Watkins' collieries, the parts of the general scheme, however lawful, considered alone, become parts of an illegal combination under the Federal statute which it is the duty of the court to dissolve, irrespective of how the legal title to the shares is held. *Northern Securities Case*, 197 U. S. 244, 291, 49 L. ed. 739, 761. So long as the defendants are able to exercise the power thus illegally acquired, it may be most efficiently exerted for the continued and further sup-

pression of competition. Through it, the defendants in combination, may absorb the remaining output of independent producers. The evil is in the combination. Without it the several groups of coal-carrying and coal-producing companies have the power and motive to compete. That each may for itself advance the price of coal or cut down the production is true. But in the power which each other group would have to compete would be found a corrective. The statute forbids the concerted action which has already brought about the strangling of a projected competing railroad and the complete control of the sale of an immense tonnage of independent coal which had prior thereto not only been a menace to their collective control of the means of transportation to New York harbor points, but a large competing factor in sales at these points. The Temple Company, therefore, affords a powerful agency by means of which the unlawful purpose which induced its acquisition may be continued beyond the mere operation of the Simpson & Watkins' collieries.

Its board of directors includes the presidents of the defendant carriers, who also are the presidents of the defendant coal companies, and these defendant companies absolutely dominate its affairs. The Temple Company also owns and dominates the great collieries obtained from Simpson & Watkins. Its board of directors, composed, as it is, of men representing the defendants, supplies time, place, and occasion for the expression of plans or combinations requiring or inviting concert of action. Though as a board it may not dictate the activities of the owning corporations, still, in view of the relation of the Temple Company to the defendant carriers and their respective coal-mining companies, and of the constitution of its directors, the attitude of its board, as indicated by the proceedings spread upon the corporate minutes, is of significance upon the question of the existence of any concerted purpose to unite the activities of its corporate owners to suppress competition. There are to be found on the minutes of the Temple Company a number of entries which point strongly to combinations between the defendants. Thus, on June 27, 1899, a committee was appointed to consider the establishment of a statistical bureau, "to keep a record of all matters of interest to the anthracite companies."

What resulted does not appear from any further minutes. On July 2, 1901, a resolution in these words was adopted:

"Resolved, That Mr. Cumming, Mr. Sayre, Mr. Henderson, Mr. Caldwell, and Mr. Warren be appointed a committee to consider the advisability and expediency of making a 40 per cent rate to outside shippers, or a flat rate, and, if so, what rate."

By "outside shippers" the witness says was meant "independent operators," who shipped their own coal. The witness by whom this action was proved says that he never saw the report and does not know that any was made by the committee. It is true that Mr. Baer, the president of the Temple Company, denied that the Temple Company had or undertook to exercise any power in respect of carrier rates, or in fixing prices of coal. He says that the minute entries referred to above are matters "interjected by somebody," under a misconception of the powers and duties of the directors of that company, and came to nothing. That he shortly took the presidency himself, and that the Temple Company "has been run as the most harmless mining company in the state of Pennsylvania," and has had nothing to do with the price of coal or with rates for transportation. But this disclaimer of power does not detract from the significance of the minutes of the board referred to as evidence bearing upon the question of the relation of the several defendants to each other.

We are in entire accord with the view of the court below in holding that the transaction involved a concerted scheme and combination for the purpose of restraining commerce among the states, in plain violation of the act of Congress of July 2, 1890.

3. We come now to the 65 per cent contracts.

The charge of the petition in respect of these contracts is substantially this:

a. That the defendant carriers possessed a substantial monopoly of all of the means of transportation between the coal region and tide water.

b. That they directly or indirectly, through their controlled coal companies, produced about 75 per cent of the annual supply of anthracite coal.

c. That 20 per cent or more of the annual supply was pro-

duced by independent operators, whose collieries were located contiguous to the carrier lines of the defendant companies.

d. This being the situation, it is charged, that for the purpose of preventing the output of these independent producers "from being sold throughout the several states in competition with the output from their own mines, or of the mines of their subsidiary coal companies, the said defendant carriers, having almost a complete monopoly of the means of transportation between the anthracite mines and tide water, entered into and now maintain an agreement, combination, or conspiracy to use their power as said carriers to obtain control of the sale and disposition of the aforesaid output of the independent mines in the markets of the several states, particularly at the great distributing market at New York harbor, in violation of the aforesaid act of July 2, 1890."

It is further averred:

e. That prior to 1900 the defendants "severally made" a large number of short-term contracts for the purchase of the coal of independent operators "along their respective lines," prices ranging from 55 to 60 per cent of the average price at tide water.

That upon the termination of these contracts the defendants, "in pursuance of a previous agreement between themselves, severally offered to make, and did make and conclude with nearly all of the independent operators along their lines, new contracts containing substantially uniform provisions agreed upon beforehand by the defendant carriers in concert, some of the operators contracting with one of the defendants and some with another," by which such operators "severally agreed" to deliver on cars at breakers "to one or the other of the defendant carriers, or its subsidiary coal company, all the anthracite coal thereafter mined from any of their mines now opened and operated, or which they might thereafter open and operate, deliveries to be made from time to time as called for," etc. In consideration, the sellers were to receive for prepared sizes 65 per cent of the general average price prevailing at tide-water points at or near New York, as computed from month to month, this average price to be settled by an expert agreed upon by the parties.

It is further averred that this price was such as to enable the

independent operator entering into one of these contracts to realize upon his coal from 15 to 50 cents more than he could when shipping on his own account after paying the established rates of transportation, waste and cost of selling, in competition with the coal of the defendants. That the difference was the price paid for the privilege of controlling the sale of the independent output, "so as to prevent it from selling in competition with the output of their own mines."

It is then further alleged that the result of this plan, "as was intended, was to draw, if not to force, the great body of independent operators into making the aforesaid contracts, thereby enabling the defendants to control absolutely, and until the mines are exhausted, the output of most of the independent anthracite mines, and to prevent it, as aforesaid, from being sold in competition with the output of their own mines in the markets of the several states, particularly in the great tide-water markets."

It is obvious that the averments do not touch upon the legality of the contracts considered severally, and ask no relief upon the theory that each was a contract in restraint of trade. The theory and charge of the bill is that, by concerted action between the defendants, the independent operators were to be induced to enter singly into uniform agreements for the sale of the entire output of their several mines and any other they might thereafter acquire, excluding a negligible amount of unmarketable coal and coal for local consumption. And the further theory of the pleading is that by such concerted action and through the higher price offered, the defendants would obtain such control of independent coal as to prevent competition in the markets of other states.

It is not essential that these contracts, considered singly, be unlawful as in restraint of trade. So considered, they may be wholly innocent. Even acts absolutely lawful may be steps in a criminal plot. *Aikens v. Wisconsin*, 195 U. S. 194, 206, 49 L. ed. 154, 160, 25 Sup. Ct. Rep. 3. But a series of such contracts, if the result of a concerted plan or plot between the defendants to thereby secure control of the sale of the independent coal in the markets of other states, and thereby suppress competition in prices between their own output and that of the independent operators, would come plainly within the

terms of the statute, and, as parts of the scheme or plot, would be unlawful. Thus, in *Swift & Co. v. United States*, 196 U. S. 375, 396, 49 L. ed. 518, 524, where a plan or scheme consisting in many parts or elements was averred to constitute a combination forbidden by the act of July 2, 1890, it was said:

"The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body, and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful."

That the plan was calculated to accomplish the design averred, in the present case, seems plain enough. The anthracite field was very limited. The means for transportation from the mines to seaboard shipping points were in the hands of the defendant carriers. They, together with their subsidiary companies, controlled about 90 per cent of the coal deposit and about 75 per cent of the annual output. If the remaining output, that of the independent operators along their several lines, could be controlled as to production and sale at tide-water points, there would inevitably result such a dominating control of a necessity of life as to bring the scheme or combination within the condemnation of the statute.

That these 65 per cent contracts were the result of an agreement through protracted conferences between the independent operators, acting, through an authorized committee, and officials of the carrier defendants, who were likewise officials of the coal companies subsidiary to the railroad companies, is plainly established. That they were designed by the defendants as a means of controlling the sale of the independent output in the market at tide-water points, thereby preventing competition with their own coal, and as a plan for removing the great tonnage controlled by the independents from being used as an inducement for the entry of competing carriers into the district, is a plain deduction.

Some of the facts which lead to this conclusion will be re-

ferred to as briefly as the great importance of the case will permit:

That for a long time many of the independent operators had been selling their output to their great rivals, the defendant carriers and their several coal companies, is true. By means of such sales and deliveries at their own breakers, the sellers avoided freight, waste, and expense of sales through agents, etc. The price they would thereby realize was fixed, and they were not dependent upon a fluctuating market. So long, therefore, as they could sell to their rivals at their breakers to better advantage than they could ship and sell on their own account, the method appealed to them. But, obviously, buyer and seller were not upon an equal plane. The former had control of freight rates and car service. The seller must pay the rate exacted and accept the car service supplied him by the buyer, or appeal to the remedies afforded by the law. If the rate of freight to tide water was onerous, and was imposed upon the coal produced by the defendants and their allied coal producers without discrimination against the coal of the independent shipper, it would nevertheless bear upon the latter oppressively, since the rate paid would find its way into the pocket of the defendants. Therefore it was that the higher the freight rate, the greater the inducement to sell to the carrier companies. That the conditions were not accepted by the independent producers as satisfactory is evident. The majority at all times stood out, and those making such agreements as well as those refusing to do so maintained an agitation for better freight rates and better prices for those who preferred to sell at their breakers. For many years before this proceeding they maintained an organization called "The Anthracite Coal Operators' Association," and through that body endeavored to improve their situation.

The series of contracts here involved were all made since 1900, and are therefore subsequent to the combination through the Temple Iron Company, already considered. The charge is that since that combination the defendants further combined through these contracts. Prior to 1900, we find no evidence of any combination or agreement for the procurement of contracts of sale with independent operators. Upon the contrary, there is much to indicate that there was more or less competition for

coal accessible to more than one of the buying defendants. The effect of competition is shown by the gradual rise in the price the great companies were willing to pay. In the earliest stages of the business the buying price seems to have been fixed with some relation to the varying wage scale of miners. This gave way to an agreed percentage of the current price at tide water. Thus the earlier contracts allowed the selling operator only 40 per cent of the tide-water price for prepared sizes. Through competition between the existing companies, and through that which resulted from the entry of new carrier lines with their subsidiary coal companies, the price was forced gradually up from 40 to 60 per cent of the tide-water price, and at this latter figure the price stood when the combination here averred came into existence.

We have mentioned the influence of the coming into the region of new coal-carrying railroads upon the per cent of the tide-water price which the independent operators were able to obtain from the buying coal companies. This influence, as we shall see, was a large factor in bringing about the contracts now in question. The carriers here defendant did not all obtain their footing in this anthracite field at the same time. Thus, when the New York, Susquehanna, & Western was projected, it, through its coal company, offered to buy coal on 50 per cent contracts. The price before that had been 40 to 45 per cent. The result was that the other companies came gradually up to the same price. This was late in the eighties, the exact date not being at hand. Again, it is said in the brief for the defendants, that:

"In the early 90's, the New York, Ontario, & Western Railroad built a branch into the Wyoming region and sought tonnage. Mr. Sturgis was commissioned beforehand by the coal company of that railroad to offer 60 per cent contracts on the understanding that, if he could secure a half million tons annually, the branch would be built. The branch railroad was built, and by its help large new acreages of coal lands were developed, tributary to the Ontario & Western Railroad."

As a consequence, says the same brief, "the other coal companies began to raise their rates to 60 per cent," and by 1892 that had become the settled price.

The influence of competition, actual or threatened, was also

illustrated in 1898, when the New York, Wyoming, & Western was projected. A large number of coal contracts had expired or were about to expire, thus creating a great tonnage open to competition. Many of the operators in the Wyoming region of the coal field united their influence to procure the building of a competing line between the mines and New York harbor points. To this end a large tonnage was pledged to its coal-selling company, which offered to pay 65 per cent of the tide-water price to such operators. How and why that project failed we have already shown in the section of this opinion devoted to the Temple Iron Company combination.

When that effort failed there arose a movement for a new road from the mines to tide water through the Pennsylvania Coal Company. That was one of the greatest of the independent companies, producing in 1899 about 2,000,000 tons. It controlled a coal-gathering railroad called the Erie & Wyoming Valley Railroad, and proposed its extension to Lackawaxen, and to cause the construction from that point of a railroad line to the Hudson river. To this end it caused to be organized the Delaware Valley & Kingston Railroad. Of this project, Mr. Thomas, the president of the Erie Railroad Company, said: "They were threatening and had started to build a competing road to the Hudson river." The independent operators, in an association maintained by them for their mutual protection, hailed this scheme with joy. At a meeting of the association on November 22, 1899, the following minute was made:

"Mr. E. L. Fuller, chairman of the executive committee, on being called upon, told of the efforts which have been made to induce the various anthracite railroads to offer more satisfactory terms for the purchase of the operators' coal, and of the absolute failure of these efforts to bring about any definite result. He then reported the organization of the Delaware Valley & Kingston Railroad, backed by the Pennsylvania Coal Company, and the proffer of this latter company to purchase coal from operators in the Wyoming and Lehigh region, paying 65 per cent of the tide-water price for chestnut and larger; 50 per cent for pea coal, and a flat 85 per cent freight rate on buck-wheat and smaller sizes. These contracts were to be for all of the coal in the ground, thus settling permanently the price which the operator would receive.

“After extended discussion as to the details of these contracts, and a comparison with the results obtained under the old contracts, the following resolution was offered and passed unanimously:

“ ‘Whereas the Erie & Wyoming Valley Railroad Company has arranged to build a branch line from Hawley, Pennsylvania, to a point on the boundary line between New York and Pennsylvania at Lackawaxen, forming a connection with a railroad proposed to be constructed by the Delaware Valley & Kingston Railroad Company to tide water, at Kingston, on the Hudson river;

“ ‘And whereas the construction of the said railroads is approved and promoted by the Pennsylvania Coal Company, which has large interests in the anthracite coal region;

“ ‘And whereas the independent operators and the general public are now largely at the mercy of the existing railroad companies, which charge unreasonable rates for their services, owing in part to the large amounts for which the said companies have been capitalized;

“ ‘And whereas it would be highly advantageous to all the independent owners of coal properties throughout the entire anthracite region of Pennsylvania to have the railroad connection, now proposed, completed as speedily as possible;

“ ‘And whereas it is equally desirable, in the interests of the people of the state of New York and the public in general, that such railroad connection shall be made (since it will necessarily result in a material reduction of the price paid for anthracite coal for consumers), now, therefore it is

“ ‘Resolved, I. That this association hereby expresses its hearty and unqualified approval of the proposed plan for the construction of the said railroads, and hereby pledges its constant support and active assistance in promoting the speedy construction and completion of the said railroads.

“ ‘II. That a committee of three be appointed by the president, of which the president shall be a member, to take such steps as may be deemed advisable toward furthering the said plans and co-operating with the said companies for the completion of the said railroads, and that a report of their proceedings be submitted to the next meeting of this association.’

“In the discussion which followed, it was the opinion of those

present that, in view of the hearty assistance which had been accorded the operators by the Pennsylvania Coal Company, it was the duty of the members to give to this company all of the tonnage which they could deliver, and not to permit any more advantageous offers which the older companies might make, to divert freight from a road which was constructed to give the operators a fair share in the selling price. A vote of thanks was accorded Mr. Fuller for his labor and great success in accomplishing a work which was for the advantage of every individual operator in the anthracite regions."

It is enough to say of this project that it was abandoned when, in 1901, the Erie Railroad acquired, without any concert of action between it and the other carrier defendants, the capital stock of the Pennsylvania Coal Company, which carried with it the capital stock of the Erie & Wyoming Valley Railroad and the Delaware & Kingston Railroad.

The persistent effort of the independents to bring into the field competing carrier and coal-producing companies was a menace to the monopoly of transportation from that field to tide water which the defendants collectively possessed. The independent output was one fourth of the annual supply. It was mainly sold at tide water, where it came into active competition with the larger production of the defendants; but, as we have already seen, this enormous tonnage offered a great inducement to the organization of new carrier lines from the mines to the seaboard. The contracts theretofore made for the purchase of this output had been for short terms. The expiration of a considerable number had more than once been the occasion for new carrier projects backed by the independent operators. To renew the contracts for short terms would not postpone the day of competition. The control in perpetuity of such a large proportion of the output as would prevent in the future effective competition in the selling markets of the coast, and at the same time remove inducement to the entry of other lines of carriers, was the obvious solution of the situation. The necessary control could only come about through concerted action. If one of the several independent groups of defendants, or two, or any less number than all, had sought to obtain control, it would have been resisted by those not included. Therefore, it is plain that if the coal of these operators was to

be placed in such situation as that it could not affect the price of their own coal, nor longer constitute a mass of tonnage sufficient to invite the construction of new lines from the mines to the sea, it must be brought about through the concerted action of the defendants.

In 1900 there occurred the great strike of the coal miners. Settled by arbitration in the fall of that year, the miners obtained a 10 per cent increase in wages. Of course, this affected the railroad coal-producing companies and the independent coal companies alike. The great companies took the lead in the arbitration and accepted the result. The independent companies were compelled to follow this lead. The latter, as we have seen, had before the strike been particularly urgent in their efforts to secure better conditions from the railroads and their allied coal companies. This rebellious attitude is partially shown by the resolution of the Anthracite Coal Operators' Association of November 22, 1899, heretofore set out. When the strike settlement was made, there was some hesitation among the independent operators about posting notice of the advance in wages, and through committees they urged upon the defendants that such advance in wages justified a reduction in freight rates and a price of not less than 65 per cent for coal sold to the defendant companies. The committees reported back that they could not obtain "any definite promise," but there has been "an intimation" that something would be done to improve the present conditions. It was thereupon resolved that the advance scale should be posted, and that a committee should be appointed "to confer with the various carrier companies, relative to a new contract." At the same meeting a number of the operators present signed an agreement empowering the committee named "to adjust all differences with certain transportation companies," and agree upon a basis of contract which should definitely and for a period of years fix the commercial relations between the said operators and the transportation companies, "each of the parties agreeing to make a particular contract for himself with the proper transportation company." This agreement, after being signed by those present, was placed in the hands of Mr. McNulty to secure further signatures. These matters appear on the minutes of the individual operators of October 5th. There ensued a number of

conferences between the representatives of the sellers and buyers. The result was that a form of contract and a price was mutually agreed upon, being the form of the 65 per cent contracts, which were thereafter entered into as the short term agreements theretofore made expired. Thus the independents put in force the advance wage scale imposed by the strike arbitrators before any agreement whatever was made or promised by the defendants. This increased scale which the arbitration imposed having been accepted by the large companies could not be successfully resisted by the independents. It only operated to make them more persistent in their demand for some improvement in the methods and prices theretofore prevailing.

That the defendant companies should offer such terms is not surprising. The contracts to be made would be not only for the life of the mines being operated at the date of the sale, but was to extend to any other mines thereafter opened by the seller. The menace of the independent output as an invitation to competing carriers and as a competing coal at tide water would be removed forever.

Upon this aspect of the case we find ourselves in agreement with Judge BUFFINGTON, who concluded a discussion of the evidence by saying:

"By such perpetual contracts . . . these defendant railroads, through their subsidiary coal companies, severally made with other collieries, these combiners withdrew and still continue to withdraw, such product, for all time, from competition, either in interstate transportation or sale. To my mind there is no more subtle and effective agency for the gradual, unnoted absorption by interstate carriers of the remaining interstate product than these perpetual contracts. Holding, then, that they are, in the words of the statute, 'contracts. . . in restraint of trade or commerce among the states,' I record my dissent to the action of the court in refusing to enjoin them.'" [183 Fed. 474.]

The coal contracts acquired when this proceeding was begun aggregated nearly one half the tonnage of the independent operators. Much of the coal so bought was sold in Pennsylvania, and all of the contracts were made in that state, and the coal was also there delivered to the buying defendants. That

the defendants were free to sell again within Pennsylvania, or transport and sell beyond the state, is true. That some of the coal was intended for local consumption may also be true. But the general market contemplated was the market at tide water, and the sales were made upon the basis of the average price at tide water. The mere fact that the sales and deliveries took place in Pennsylvania is not controlling when, as here, the expectation was that the coal would, for the most part, fall into and become a part of the well-known current of commerce between the mines and the general consuming markets of other states. "Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business." *Swift & Co. v. United States*, 196 U. S. 396, 398, 49 L. ed. 524, 525; *Loewe v. Lawlor*, 208 U. S. 274, 52 L. ed. 488, 13 Ann. Cas. 815. The purchase and delivery within the state was but one step in a plan and purpose to control and dominate trade and commerce in other states for an illegal purpose. As was said by the Chief Justice, in *Loewe v. Lawlor*, cited above:

"Although some of the means whereby the interstate traffic was to be destroyed were acts within a state, and some of them were in themselves, as a part of their obvious purpose and effect, beyond the scope of Federal authority, still, as we have seen, the acts must be considered as a whole, and the plan is open to condemnation, notwithstanding a negligible amount of intrastate business might be affected in carrying it out. If the purposes of the combination were, as alleged, to prevent any interstate transportation at all, the fact that the means operated at one end before physical transportation commenced, and at the other end after the physical transportation ended, was immaterial."

The general view which this court took of the effect of these contracts upon interstate traffic in the coal of this region is indicated in *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 42, 48 L. ed. 860, 868. The concerted plan concerned the relations of these railroads to their interstate commerce, and directly affected the transportation and sale and price of the coal in other states. The prime object in engaging in this scheme was not so much the control and sale of coal in Pennsylvania, but the control of sales at New York harbor.

That per cent of the average price at tide water retained by

the buyer was assumed to cover the freight, waste, and cost of sale. There is evidence tending strongly to show that an independent accepting one of these contracts realized slightly more than he could realize if he had shipped and sold on his own account. This advanced price, therefore, as charged in the bill, constituted a great inducement to draw the independents within the control of the defendants, and makes it highly probable that, if not enjoined, they will absorb the entire independent output.

The defendants insist that these contracts were but the outgrowth of conditions peculiar to the anthracite coal region, and are not unreasonably in restraint of competition, but mutually advantageous to buyer and seller.

That the act of Congress does not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose, was pointed out in the Standard Oil Case, 221 U. S. 1, 55 L. ed. 619, 34 L. R. A. (N. S.) 834. In that case it was also said that the words "restraint of trade" should be given a meaning which would not destroy the individual right of contract, and render difficult, if not impossible, any movement of trade in the character of interstate commerce, the free movement of which it was the purpose of the statute to protect. We reaffirm this view of the plain meaning of the statute, and in so doing limit ourselves to the inquiry as to whether this plan or system of contracts entered into according to a concerted scheme does not operate to unduly suppress competition and restrain freedom of commerce among the states.

Before these contracts there existed not only the power to compete, but actual competition between the coal of the independents and that produced by the buying defendants. Such competition was, after the contracts, impracticable. It is, of course, obvious that the law may not compel competition between these independent coal operators and the defendants, but it may at least remove illegal barriers resulting from illegal agreements which will make such competition impracticable.

Whether a particular act, contract, or agreement was a reasonable and normal method in furtherance of trade and commerce may, in doubtful cases, turn upon the intent to be

inferred from the extent of the control thereby secured over the commerce affected, as well as by the method which was used. Of course, if the necessary result is materially to restrain trade between the states, the intent with which the thing was done is of no consequence. But when there is only a probability, the intent to produce the consequences may become important. *United States v. Terminal R. Asso.* 224 U. S. 383, 394, 56 L. ed. 810, 813; *Swift & Co. v. United States*, 196 U. S. 375, 49 L. ed. 518.

In the instant case the extent of the control over the limited supply of anthracite coal by means of the great proportion theretofore owned or controlled by the defendant companies, and the extent of the control acquired over the independent output which constituted the only competing supply, affords evidence of an intent to suppress that competition, and of a purpose to unduly restrain the freedom of production, transportation, and sale of the article at tide water markets.

The case falls well within not only the *Standard Oil and Tobacco Cases*, 221 U. S. 1, 55 L. ed. 619, 34 L. R. A. (N. S.) 834, 221 U. S. 106, 55 L. ed. 663, but is of such an unreasonable character as to be within the authority of a long line of cases decided by this court. Among them we may cite: *Northern Secur. Co. v. United States*, 193 U. S. 197, 48 L. ed. 679; *Swift & Co. v. United States*, 196 U. S. 375, 49 L. ed. 518; *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 49 L. ed. 689; *United States v. Terminal R. Asso.*, 224 U. S. 383, 56 L. ed. 810, and the recent case of *United States v. Union P. R. Co.*, 226 U. S. 61, 57 L. ed. 124.

We are thus led to the conclusion that the defendants did combine for two distinct purposes,—first, by and through the instrumentality of the Temple Iron Company, with the object of preventing the construction of an independent and competing line of railway into the anthracite region; and, second, by and through the instrumentality of the 65 per cent contracts, with the purpose and design of controlling the sale of the independent output at tide water.

The acts and transactions which the bill avers to have been committed by some of the defendants in furtherance of the illegal plan and scheme of a general combination are these:

- a. The absorption in January, 1898, of the New York, Sus-

quehanna, & Western Railroad, through the purchase by the Erie Railroad of a large majority of its shares, whereby two lines of competing railroad came under one control and management.

b. The acquisition in 1901 of a controlling majority of the capital stock of the Central Railroad of New Jersey by the Reading Company, which then owned the entire capital stock of the Philadelphia & Reading Railway Company and the Philadelphia & Reading Coal & Iron Company, "thereby uniting and bringing together under a common head and source of control the said Philadelphia & Reading Railway Company and Central Railroad Company of New Jersey, operating parallel and competitive lines of railroad, and the said Philadelphia & Reading Coal & Iron Company and Lehigh & Wilkesbarre Coal Company," theretofore owned and controlled by the Central Railroad of New Jersey, thereby destroying competition between former competing carriers and coal-producing companies.

c. The absorption in 1899 by the Erie Railroad Company of the Pennsylvania Coal Company, thereby acquiring the stock control of the Erie & Wyoming Railroad Company and of the Delaware Valley & Kingston Railroad, thus defeating a projected construction of the last-named railroad.

These were all minor combinations in which only some of the defendants participated. The accomplishment of these several subordinate transactions only completed one or another of the several groups of carriers and coal-producing companies, which several groups thereafter not only possessed of the power to compete with every other group, but, as we have already seen, were actually engaged in competing one with another, prior to the general combination through the Temple Iron Company and the 65 per cent contract scheme.

So far as this record shows, not one of these transactions was the result of any general combination between all of the defendants, and constituted no part of any such general combination. None of the defendants had any part or lot in bringing them about except the particular combining companies.

It is true that the bill asks injunctions against the continuance of each of these minor combinations. But if, as we conclude, they did not constitute any part of any general plan or combination entered into by all of the carrier companies, their

separate consideration as independent violations of the act of Congress is not admissible under the general frame of this bill. To treat the bill as one seeking to apply the prohibition of the act of Congress to each one of these independent combinations would condemn the pleading as a plain misjoinder of parties and of causes of suit, and a plain confession of multifariousness. All of the defendants had a common interest in the defense of the Temple Iron Company combination, and that of the 65 per cent contracts, because it was alleged that all had joined therein. But all of the defendants did not have a common interest in the defense of these three minor combinations, unless it appear that they were, as charged, "steps," or acts and agreements in furtherance of the general combination to which they were all parties. This we find not to be the fact. If, therefore, we shall treat the bill as broad enough to involve combinations which were not steps or acts in furtherance of any general combination, we shall overrule the objection of multifariousness, made below and here, for we shall then maintain a bill setting up three separate and distinct causes of action against the distinct groups of defendants, one having no interest in or connection with the other. The grounds of each suit would be different and the parties defending different. See the discussion and cases cited in *Simkins*, Fed. Eq. Suit, pp. 290, et seq.

Having failed to show that these minor combinations were acts in furtherance of the general scheme, or the acts of the combiners in the two combinations condemned, we are asked to deal with them as separate illegal combinations by such of the defendants as participated. This the court below declined to do, and we in this find no error.

As to the legality of the minor combinations, we therefore express no opinion. We affirm the action of the court below in declining to enjoin them, because to construe the bill as directed against them as independent combinations, between some, but not all, of the principal defendants, would make the pleading objectionably multifarious. We therefore direct that the bill be dismissed, without prejudice, in so far as it seeks relief against the three alleged minor combinations.

The decree of the court below is affirmed as to the Temple Iron Company combination. It is reversed as to the 65 per cent

contracts, and the case will be remanded with direction to enter a decree canceling each of these contracts, and perpetually enjoining their further execution, and for such proceedings as are in conformity with this opinion.

Mr. Justice DAY, Mr. Justice HUGHES, and Mr. Justice PITNEY did not participate in the consideration or decision of this case.

UNITED STATES v. PACIFIC & ARCTIC RY. & NAV. CO.

(Supreme Court of United States, 1913. 228 U. S. 87.)²¹

Indictment for alleged violations of the Sherman anti-trust act and of the interstate commerce act.

The indictment contains six counts. The first and second counts charge violations of the anti-trust law. The first, by the defendants engaging in a combination and conspiracy in restraint of trade and commerce with one another, to eliminate and destroy competition in the business of transportation in freight and passengers between various ports in the United States and British Columbia in the south, and the various cities in the valleys of the Yukon river and its tributaries, both in British and American territory, in the north, upon a line of traffic described, for the purpose and with the intention of monopolizing such trade and commerce. The second count charges the monopolization of trade and commerce in the same business and between the same ports. The manner of executing the alleged criminal purpose is charged to be the same in both counts.

The places of the incorporation of the corporate defendants are alleged, and the following facts: The Pacific Coast Steamship Company and the Alaska Steamship Company operate respectively lines of steamships as common carriers of freight and passengers running in regular route between Seattle, state of Washington, and Skagway, Alaska. The Canadian Pacific Railway Company is a like carrier, and operates a line of steamships between Vancouver, British Columbia, and Skag-

21—Names and arguments of counsel omitted.

way. During the time mentioned in the indictment, the Pacific & Arctic Railway & Navigation Company owned and operated a railroad from tidewater at Skagway to the summit of White Pass, a distance of about 20 miles to the boundary line between Alaska and British Columbia, at which latter point it connected with a railroad owned and operated by the British Columbia Yukon Railway Company. The latter road extended from the summit of White Pass to the east shore of Lake Bennett and the boundary line between British Columbia and Yukon district of Canada, a distance of about 25 miles, at which point it connected with another railroad, owned and operated by the British Yukon Railway Company, which extends to White Horse on the headwaters of the Yukon river, in Yukon district of Canada. During all the times mentioned there was a line of steamers plying upon the Yukon river and the headwaters thereof between White Horse and Dawson, owned and operated by the British Yukon Navigation Company. The four corporations last above mentioned and their stocks and bonds were owned and controlled by the same persons and individuals, and the said three lines of railroads and their lines of steamers were under one and the same management, and were operated as one continuous line of common carriers of freight and passengers between the towns of Skagway and Dawson and way points, under the name and style of the White Pass & Yukon Route, referred to as "the railroad," and had the sole and exclusive monopoly of the transportation business between Lynn canal and the navigable waters of the Yukon river. A general trade and commerce was carried on between British Columbia and Puget sound ports and the Yukon valley, both in American and British territory, over the designated routes and to the various places on the routes, and the shortest and most natural route for such trade and commerce was, has been, and is by water craft from said southern ports to Skagway, and thence over Moore's wharf, so called, to the points of destination. Trade and commerce from White Horse and Dawson to said southern ports would naturally, when left untrammelled by unlawful interference, move up the Yukon to the headwaters of that river, and thence, by the way of said railroad, to Skagway, Alaska, thence over said Moore's wharf,

and thence by steamship or other water craft to the said southern ports.

The North Pacific Wharves & Trading Company was the owner and in exclusive possession and control of all of the wharves at Skagway at which steamships or other water crafts could take and discharge, or load cargo, that company having a complete and absolute monopoly of the wharfage business at Skagway, and owning and operating the Moore wharf, which wharf, by agreement between the Wharves Company and the railroad, had been made and was the terminus of the railroad, over which all freight going to or coming from or passing through Skagway had necessarily to pass. The wharf was operated as a public wharf. Continuously during the three years immediately preceding the finding of the indictment, the defendants combined and conspired together to eliminate and destroy competition in the transportation business between the said southern ports and Skagway, for the purpose and with the intention of giving to and creating for the Alaska Steamship Company, the Pacific Coast Steamship Company, and the Canadian Pacific Railroad Company, a monopoly of such business, and, to that end, purpose, and intention, entered into, and continuously maintained, a joint traffic arrangement between the railroad and the steamship companies, by and through the individual defendants as officers and agents of the corporate defendants, pursuant to which arrangement either of the steamship companies could and did bill freight and passengers through from either of the said southern ports to any point on the said railway or on said Yukon river or its tributaries along and over the route of travel and transportation described, and the railroad could and did bill freight and passengers through from Yukon and other northern points to said southern ports only on ships from Skagway south, billing to either of the steamship companies. The rates for freight and passengers were fixed, and an apportionment between the said respective carriers of the gross receipts was established and agreed upon. With the like intent and purpose it was agreed that the railroad should, and it did, refuse to enter into any joint through traffic arrangement with any other carrier or carriers, and refused to receive any other through billing on shipments from the said southern ports except such as arrived at Skagway by

some ship belonging to one of the steamship companies, or from said Yukon points to the southern ports, except by the same ships. As part of the same combination and with the same intent and purpose it was agreed that the Wharves Company should, and it did, during all the times mentioned, charge wharfage at the rate of \$2 per ton for all freight handled over its wharf except when the same was shipped on a vessel owned by either of the companies, or was consigned to someone who had entered into or was about to enter into a contract with either of said steamship companies to bind himself to have all of his freight carried by such steamship company and by no one else, in which latter case a wharfage of \$1 per ton only was charged, and any charge in excess of \$1 was unreasonably high, and was exacted for the unlawful purpose aforesaid. With like intention and purpose, and as part of the same combination and conspiracy, it was arranged and agreed by and between the defendants that the said railroad should, and it accordingly did, fix and establish local rates and transportation charges for freight and passengers from 5 per cent to 25 per cent higher than the through joint rates, differing according to classification of the various commodities shipped. Pursuant to such arrangement, and the purpose and intention aforesaid, the said railroad received for through shipments, as its share of freight charges, from 15 per cent to 30 per cent less than it charged for the same class of freight shipped between Skagway and the same Yukon points. By reason of the facts alleged it became and was, during all of the time mentioned, unprofitable for the public to employ any carrier in the trade, traffic, or commerce save and except the said steamship companies, and competition in the said water transportation between the steamship companies and other carriers was in that manner and by the means of said combination and conspiracy eliminated and destroyed, the defendants being enabled to monopolize such trade, traffic, transportation, and commerce, to the injury of the public.

The third count charged an unlawful and unjust discrimination in the transportation of passengers and freight, in violation of the interstate commerce act. The discrimination is charged to have been practised against the Humboldt Steamship Company between January 1, 1909, and August 10, 1910,

which company is alleged to be a California corporation, and engaged as a common carrier of freight and passengers, operating a line of steamers from the same ports from which the defendant steamship companies operate their respective lines to Skagway, Alaska. In the conduct of its business the Humboldt Steamship Company operated a steamship called the "Humboldt" on a regular schedule and route between Seattle, Washington, and Skagway. "The railroad," as we have seen the White Pass & Yukon Route is called in all of the counts, had entered into and maintained during the time aforesaid, with the defendant steamship companies, a joint traffic arrangement whereby and under the terms of which freight and passengers might be billed at a joint through rate from the said southern ports over the route described to the various Yukon points, but refused, without cause or excuse, to enter into a joint traffic arrangement with the Humboldt Company, though requested to do so, or to receive, carry, or handle any freight billed through from Seattle to Yukon points on the railroad or the Yukon river; and neither would nor did carry any freight whatever from Skagway to any of said points in British or American territory at a less rate or charge than from 5 per cent to 30 per cent more, according to classification and character, than it received from the defendant steamship companies as its proportion of joint through rates from such southern points to the corresponding Yukon points. The railroad company, it is charged, caused the North Pacific Wharves & Trading Company to charge for all freight shipped on the steamship "Humboldt" for transshipment on the railroad to points along its line on the Yukon river, a wharfage of \$2 per ton, whereas it included at the same time in its portion of the through rate on through bills under its arrangement with defendant steamship companies all wharfage charges. And it is alleged that the defendants knowingly, wilfully, and maliciously induced and incited the railroad company to practise the discrimination described, and each and all aided and abetted one another and the railroad company in such practice.

The other facts as to routes, commerce, and carriers, their relations and arrangements and the effect of them, are the

same as in the first and second counts, the order of statement being somewhat different.

Count 4 is the same, as to the facts alleged, as the third count, except the discrimination is charged to have been practised against the Humboldt Steamship Company between August 18, 1910, and January 1, 1912.

Count 5 brings the discrimination charged down to the finding and presentation of the indictment. There is no allegation of discrimination in wharfage charges.

Count 6 charges the crime of conspiracy to commit an offense against the United States by destroying competition between the defendant steamship companies and the Humboldt Steamship Company. The same facts are alleged as in the other counts.

Motions to quash the indictment and each of its counts were made and denied. Demurrers to the indictment were filed and sustained to all counts but the 6th. To that, the demurrer of the individual defendants was sustained.

MR. JUSTICE McKENNA, after stating the case as above, delivered the opinion of the court:

The district court said that it was "without jurisdiction to entertain or determine the questions involved in the first five counts of the indictment in either a criminal or civil proceeding," until the matters of discrimination between carriers or shippers, or the giving or refusing of joint traffic arrangements, "have been submitted to and passed on by the Interstate Commerce Commission." For this conclusion the court relied on *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 427, 51 L. ed. 553, 9 Ann. Cas. 1075, and *Baltimore & O. R. Co. v. United States*, 215 U. S. 492, 54 L. ed. 296.

It may be well, even at the expense of repetition, to give a summary of the indictment before passing to the special contention of the parties. The route described is between ports of the United States (called southern ports) and places in northern Alaska and Canada (called northern ports)—(1) by steamship lines from the United States and Vancouver, (southern ports) to Skagway (the entire wharfage facilities being owned by the North Pacific Wharves & Trading Company); (2) thence by railroad to the headwaters of the Yukon river;

(3) thence by boat down the Yukon river to Dawson, etc. (called the northern ports). The route is designated as the White Pass & Yukon Route, and is constituted of (a) the Pacific & Arctic Railway & Navigation Company, a West Virginia corporation; (b) the British Columbia-Yukon Railway Company, incorporated under the laws of British Columbia; (c) the British-Yukon Railway Company, incorporated under the laws of the Dominion of Canada; and (d) the British-Yukon Navigation Company, Limited, incorporated under the laws of British Columbia. These companies are referred to as "the railroad company," and own the only line of transportation between the wharf at Skagway and the Yukon river.

By mutual agreement between the defendant steamship companies, the Wharves Company, and the railroad company, through routes and joint rates were established, thus making one continuous line of common carriers for freight and passengers between the United States (southern ports) and northern Alaska (northern ports).

The Humboldt Steamship Company and other independent lines plied between the United States and Skagway.

By agreement between the defendants, the railroad refused to make any through route or joint rates with the Humboldt Company, or with any of the independent steamship lines, and refused to bill freight or passengers from the United States to Yukon river points, or reversely, except by ships belonging to one of the defendant companies.

By agreement between the defendants the railroad fixed so-called local rates between Skagway and the Yukon river points, which rates were very much higher than the railroad's *pro rata* of the through rate.

The Wharves Company charged \$2 a ton for freight if shipped on a vessel not owned by one of the defendant companies. If so shipped and consigned to one who had entered into, or was about to enter into, a contract to have all of his shipments so carried, the wharfage charge was only \$1. Wharfage charges in excess of \$1 are unreasonably high.

As a result of the agreement, shippers were compelled to use only the ships of the defendant steamship companies, as in that way alone could lower through rates be obtained. Competition in water transportation was destroyed between the

defendant steamship companies and the independent lines, defendants obtained a monopoly of the transportation business between the United States and Alaska, and the Humboldt Company was discriminated against in the matter of through rates. These agreements between the defendant companies are alleged to be (count 1) for the purpose of eliminating competition from the business of transportation between the United States and Alaska; (second count) to monopolize such business; (counts 3, 4, and 5) to discriminate against the Humboldt Company. Count 6 we omit from consideration for the present.

The charges of the indictment may be even further concentrated and attention directed to these elements: The defendant steamship lines and the Humboldt and independent lines from the United States to Skagway, the wharf at Skagway, and the railroad from Skagway to the Yukon river points. The only possibility of competition is in the water part of this route. This controlled, the entire transportation is controlled; and to this control the action of the defendants was directed, the means of control being an agreement between the defendants to throw all the trade into the hands of the defendant steamship companies by the railroad company establishing through route and joint rates with them, and refusing to do so with the Humboldt Company or any of the independent companies. The Wharves Company gave its assent by its wharfage charges, and all evasion was prevented by so fixing the local rates that their combination was greater than the through rate agreed on. It is manifest that the scheme was effective, and cut out the Humboldt line and the independent lines as factors in the routes of transportation between the United States and the Yukon river points. Is the scheme illegal?

This is asserted by the government and denied by the defendants. The court below, if we take some parts of its decision, held that the forum of that question was the Interstate Commerce Commission. But, considering the decision of the court as a whole, we think it construed the anti-trust act, upon which counts 1 and 2 were based, and to those counts we shall confine our discussion for the present. This is admitted by defendants. They say that as the court held that,

in order to constitute restraint of trade or monopolization of trade under the anti-trust act, the acts charged must be such as at common law constituted restraint of trade, and were unlawful, to that extent the court construed the act. And, setting forth the grounds of the ruling, counsel say that the court decided that the entering into through-route agreements by a common carrier with one or more connecting carriers, and the refusal to make such agreements with other connecting carriers, was not unlawful either at common law or by the interstate commerce act; and the court held, therefore, that such act did not constitute restraint within the meaning of the anti-trust act. The right of a carrier to select its connections must be admitted (we state the right as absolute, without regard to the interstate commerce act, for our present purposes), and if there were nothing else in the case the conclusion of the district court would have to be affirmed. But there is another and important element to be considered. The charge of the indictment is that the agreements were entered into not from natural trade reasons, not from a judgment of the greater efficiency or responsibility of the defendant steamship lines as instruments in the transportation than the independent lines, but as a combination and conspiracy in restraint of trade by preventing and destroying competition in the transportation of freight and passengers between the United States and Alaska, and obtaining a monopoly of the traffic by engaging not to enter into agreements with the independent lines. There is a charge, therefore, of infringement of the anti-trust law,—of something more done than the exercise of the common-law right of selecting connections, and the scheme becomes illegal. *Swift & Co. v. United States*, 196 U. S. 375, 396, 49 L. ed. 518, 524. We do not pause to justify this conclusion, either by the general purpose of the act or by its adjudged applications. Its general purpose has been elaborately set forth in very recent cases; and particular instances of its application, pertinent to the case at bar and illustrative of it, are exhibited by *Swift & Co. v. United States*, *supra*, and *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 57 L. ed. 107. In those cases, as here, rights were brought forward to justify a purpose which transcended the limits put upon their exercise by the anti-trust act. In those cases, as

here, the purpose (the means being different) was the prevention or destruction of competition, and the agreements here are exactly adapted to the purpose. Not the railroad only, but the Wharves Company as well, is charged to be in the combination. It was intermediate the railroad and the steamship lines, and discriminated in its wharfage charge, it is alleged, to aid in the purpose of the combination; and, to complete and make effective the purpose, the local rates from Skagway to Yukon points were made greater than that part of the through transportation.

Whether \$2 per ton (the rate charged to independent lines, as against \$1 per ton, charged to the defendant steamship lines) was reasonable or unreasonable, or whether a through rate may be less than the sum of the local rates, we are not called upon to consider, although the court below thought the inquiry important, and the defendants make it prominent in their contentions. The plan makes the parts unlawful (*Swift & Co. v. United States*, supra), whatever they may be independently of it, and whether there is or is not a standard of reasonableness which juries may apply is aside from the question. It is equally unimportant to consider whether the Interstate Commerce Commission has power to pass on the rates, as such, or through routing, as such. We are dealing with an indictment which charges a criminal violation of the anti-trust act, and of that the criminal courts have cognizance, with power of decision upon the principle which we have expressed.

The next contention of defendants is that, as part of the transportation route was outside of the United States, the anti-trust law does not apply. The consequences and, indeed, legal impossibility, are set forth to such application, and, it is said, "make it obvious that our laws relating to *interstate* and *foreign* commerce were not intended to have any effect upon the carriage by foreign roads in foreign countries, and . . . it is equally clear that our laws cannot be extended so as to control or affect the foreign carriage." This is but saying that laws have no extraterritorial operation; but to apply the proposition as defendants apply it would put the transportation route described in the indictment out of the control of either Canada or the United States. These consequences we cannot accept. The indictment alleges that the four companies

which constitute the White Pass & Yukon Route (referred to as the railroad), and owned and controlled by the same persons, entered into the combination and conspiracy alleged, with the intention alleged, with the Wharves Company and the defendant steamship companies. In other words, it was a control to be exercised over transportation in the United States, and, so far, is within the jurisdiction of the laws of the United States, criminal and civil. If we may not control foreign citizens or corporations operating in foreign territory, we certainly may control such citizens and corporations operating in our territory, as we undoubtedly may control our own citizens and our own corporations.

The ruling of the district court, sustaining the demurrer to the first and second counts, was therefore erroneous.

The decision of the district court upon counts 3, 4, and 5 must be determined upon different principles than those which we have just expressed in passing on counts 1 and 2. The district court, as we have seen, decided that the conduct of the defendants was not subject to judicial review in a criminal or civil case until it had been submitted to and passed upon by the Interstate Commerce Commission. The government attacks the conclusion with arguments of great strength, and contends that it makes the Commission not only the judges of the civil relief that private shippers may be given against the carriers by the interstate commerce act, but gives the Commission the control and practical determination of the criminal provisions of the law. The argument, in effect, is that the conclusion of the district court confounds the civil and criminal remedies of the law, the private injury and the public injury, resulting from the violation of its provisions. And who, it is asked, will initiate the criminal proceeding, and by what proof will it be supported? What degree of proof is to be accorded to the finding of the Commission—presumptive or conclusive? If neither, it is argued, "it would be a senseless thing to regard such a finding as a condition precedent of the United States to indict." If, it is asked further, the finding of the Commission is to have either *prima facie* or conclusive effect, against whom is it to have such effect? If against a defendant, what becomes of the 6th Amendment of the Constitution? The argument of the government is cast in a series

of questions which end in the final answer, as it is contended, that under the decision of the district court the Interstate Commerce Commission "becomes practically the court of final criminal jurisdiction."

The contentions of the government would be formidable indeed if the interstate commerce act was entirely criminal. But it is more regulatory and administrative than criminal. It has, it is true, a criminal provision against violations of its requirements, but some of its requirements may well depend upon the exercise of the administrative power of the Commission. This view avoids the consequences depicted by the government. It keeps separate the civil and criminal remedies of the act, each to be exercised in its proper circumstances. It makes the interstate commerce act what it was intended to be and defined to be in the cases cited by the district court, to wit: *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 427, 51 L. ed. 553, 9 Ann. Cas. 1075, and *Baltimore & O. R. Co. v. United States*, 215 U. S. 492, 54 L. ed. 296. And it would, in our judgment, be an erroneous view to take that the great problems which the act was intended to solve, and the great purposes it was intended to effect, should be considered of less consequence than the facility which should be given to some particular remedy, civil or criminal. We need not extend the discussion. The purpose of the interstate commerce act to establish a tribunal to determine the relation of communities, shippers, and carriers, and their respective rights and obligations dependent upon the act, has been demonstrated by the cited cases, and also the sufficiency of its powers to deal with the circumstances set forth in the indictment.

The district court sustained count 6 against the demurrer of the corporate defendants, but held its averments were not sufficient to connect the individual defendants with the offense charged. This is a construction of the indictment, and not subject to review.

It is urged by the individual defendants that the objection is applicable to the other counts of the indictment, and that the court would have undoubtedly so ruled but for its construction of the anti-trust act; and it is also urged that in case of reversal of the court's decision upon the construction of the act, it be permitted to pass upon such of the grounds of

demurrer as were not passed upon in the former ruling. We yield to the request, and the more readily as the government does not express great confidence in the sufficiency of the indictment. Its final contention is that the judgment of the district court be reversed, with instructions "to pass on the sufficiency of the indictment without regard to the action or nonaction of the Interstate Commerce Commission."

The judgment is therefore reversed as to counts 1 and 2, and the case remanded with instructions to proceed in accordance with this opinion.

(b) Of Trading and Manufacturing Units

ADDYSTON PIPE & STEEL CO. v. UNITED STATES

(Supreme Court of United States, 1899. 175 U. S. 211.)

MR. JUSTICE PECKHAM [after holding the Sherman Anti-Trust Act constitutional, see *supra*, pp. 772-780, continued as follows]:

We are thus brought to the question whether the contract or combination proved in this case is one which is either a direct restraint or a regulation of commerce among the several states or with foreign nations contrary to the act of Congress. It is objected on the part of the appellants that even if it affected interstate commerce the contract or combination was only a reasonable restraint upon a ruinous competition among themselves, and was formed only for the purpose of protecting the parties thereto in securing prices for their product that were fair and reasonable to themselves and the public. It is further objected that the agreement does not come within the act because it is not one which amounts to a regulation of interstate commerce, as it has no direct bearing upon or relation to that commerce, but that, on the contrary, the case herein involves the same principles which were under consideration in *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, and, in accordance with that decision, the bill should be dismissed.

Referring to the first of these objections to the maintenance of this proceeding, we are of opinion that the agreement or

combination was not one which simply secured for its members fair and reasonable prices for the article dealt in by them. Even if the objection thus set up would, if well founded in fact, constitute a defense, we agree with the circuit court of appeals in its statement of the special facts upon this branch of the case and with its opinion thereon as set forth by Circuit Judge TAFT, as follows:

[The Court then quoted from the opinion of TAFT, J., as heretofore set out, pp. 644-647, commencing with the words: "The defendants, being manufacturers and vendors of cast-iron pipe, entered into a combination to raise the prices for pipe for all the states west and south of New York," etc., and concluding with the sentence: "The same thing was true all through pay territory to a greater or less degree, and especially at reserved cities." The opinion of Mr. Justice PECKHAM then continued as follows:]

The facts thus set forth show conclusively that the effect of the combination was to enhance prices beyond a sum which was reasonable, and therefore the first objection above set forth need not be further noticed.

We are also of opinion that the direct effect of the agreement or combination is to regulate interstate commerce, and the case is therefore not covered by that of *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249.

[The balance of the opinion deals with the question whether the contracts and combination in question operated to regulate interstate commerce so as to come within the terms of the Sherman Act.]

The Court concluded:

To the extent that the present decree includes in its scope the enjoining of defendants thus situated from combining in regard to contracts for selling pipe in their own state, it is modified and limited to that portion of the combination or agreement which is interstate in its character.

As thus modified the decree is affirmed.

MONTAGUE & CO. v. LOWRY

(Supreme Court of United States, 1904. 193 U. S. 38.)

Statement by Mr. Justice PECKHAM:

This action was brought under § 7 of the act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3202), commonly called the anti-trust act. The section reads as follows:

“Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney’s fee.”

Plaintiffs in error (defendants below) seek to review the judgment of the circuit court of appeals for the ninth circuit (52 C. C. A. 621), affirming a judgment for plaintiffs, entered in the circuit court for the northern district of California, upon a verdict of a jury. 106 Fed. 38.

It appeared in evidence on the trial in the United States circuit court that the plaintiffs for many years prior to the commencement of this action had been copartners, doing business as such in the city of San Francisco in the state of California, and dealing in tiles, mantels, and grates, and that The Tile, Mantel, & Grate Association of California, and the officers and members thereof, had since on or about the — day of January, 1898, constituted under that name an unincorporated organization composed of wholesale dealers in tiles, mantels, and grates, who were citizens and residents of the city and county of San Francisco, or the city of Sacramento, or the city of San José in the state of California, and such organization was also composed of the manufacturers of tiles, mantels, and grates, who were residents of other states, and engaged in the sale of their manufactured articles (among others) to the various other defendants in the state of California. There were no manufacturers of tiles within the state of California, and all the defendants who were residents of that state and who were also dealers in tiles, in the prosecution of their busi-

ness, procured the tiles from outside the state of California and from among those manufacturers who were made defendants herein. The manufacturers and dealers were thus engaged in the prosecution of a business which, with reference to the sales of tiles, amounted to commerce between the states. Under these circumstances the dealers in tiles, living in San Francisco, or within a radius of 200 miles thereof, and being some of the defendants in this action, together with the eastern manufacturers of tile, who are named as defendants herein, formed an association called The Tile, Mantel, & Grate Association of California. The objects of the association, as stated in the constitution thereof, were to unite all acceptable dealers in tiles, fireplace fixtures, and mantels in San Francisco and vicinity (within a radius of 200 miles) and all American manufacturers of tiles, and by frequent interchange of ideas advance the interests and promote the mutual welfare of its members.

By its constitution, article I., § 1, it was provided that any individual, corporation, or firm engaged in or contemplating engaging in the tile, mantel, or grate business in San Francisco, or within a radius of 200 miles thereof (not manufacturers), having an established business and carrying not less than \$3,000 worth of stock, and having been proposed by a member in good standing and elected, should, after having signed the constitution and by-laws governing the association, and upon the payment of an entrance fee as provided, enjoy all the privileges of membership. It was provided in the second section of the same article that all associated and individual manufacturers of tiles and fireplace fixtures throughout the United States might become nonresident members of the association upon the payment of an entrance fee as provided, and after having signed the constitution and by-laws governing the association. The initiation fee was, for active members, \$25, and for nonresident members \$10, and each active member of the association was to pay \$10 per year as dues, but no dues were charged against nonresidents.

An executive committee was to be appointed whose duty it was to examine all applications for membership in the association and report on the same to the association. It does not appear what vote was necessary to elect a member, but it is alleged in the complaint that it required the unanimous con-

sent of the association to become a member thereof, and it was further alleged that by reason of certain business difficulties there were members of the association who were antagonistic to plaintiffs, and who would not have permitted them to join if they had applied, and that plaintiffs were not eligible to join the association for the further reason that they did not carry at all times stock of the value of \$3,000.

The by-laws, after providing for the settlement of disputes between the members and their customers, by reason of liens, foreclosure proceedings, etc., enacted as follows, in article III.:

"Sec. 7. No dealer and active member of this association shall purchase, directly or indirectly, any tile or fireplace fixtures from any manufacturer or resident or traveling agent of any manufacturer not a member of this association, neither shall they sell or dispose of, directly or indirectly, any unset tile for less than list prices to any person or persons not a member of this association, under penalty of expulsion from the association.

"Sec. 8. Manufacturers of tile or fireplace fixtures or resident or traveling agents of manufacturers selling or disposing, directly or indirectly, their products or wares to any person or persons not members of the Tile, Mantel, & Grate Association of California, shall forfeit their membership in the association."

The term "list prices," referred to in the seventh section, was a list of prices adopted by the association, and when what are called "unset" tile were sold by a member to any one not a member, they were sold at the list prices so adopted, which were more than 50 per cent higher than when sold to a member of the association.

The plaintiffs had established a profitable business and were competing with all the defendants who were dealers, and engaged in the business of purchasing and selling tiles, grates, and mantels in San Francisco prior to the formation of this association. The plaintiffs had also before that time been accustomed to purchase all their tile from tile manufacturers in eastern states (who were also named as parties defendant in this action), and all of those manufacturers subsequently joined the association. The plaintiffs were not members of the association and had never been, and had never applied for

membership therein, and had never been invited to join the same.

The proof shows that by reason of the formation of this association the plaintiffs have been injured in their business, because they were unable to procure tile from the manufacturers at any price, or from the dealers in San Francisco, at less than the price set forth in the price list mentioned in the seventh section of the by-laws, *supra*, which was more than 50 per cent over the price at which members of the association could purchase the same. Before the formation of the association the plaintiffs could and did procure their tile from the manufacturers at much less cost than it was possible for them to do from the dealers in San Francisco after its formation.

There was proof on the part of the defendants below that the condition of carrying \$3,000 worth of stock, as mentioned in the constitution, had not always been enforced, but there was no averment or proof that the article of the constitution on that subject had ever been altered or repealed.

The jury rendered a verdict for \$500 for the plaintiffs, and, pursuant to the provisions of the seventh section of the act, judgment for treble that sum, together with what the trial court decided to be a reasonable attorney's fee, was entered for the plaintiffs.

MR. JUSTICE PECKHAM, after making the foregoing statement, delivered the opinion of the court:

The question raised by the plaintiffs in error in this case is, whether this association, described in the foregoing statement of facts, constituted or amounted to an agreement or combination in restraint of trade within the meaning of the so-called anti-trust act of July 2, 1890?

The result of the agreement when carried out was to prevent the dealer in tiles in San Francisco, who was not a member of the association, from purchasing or procuring the same upon any terms from any of the manufacturers who were such members, and all of those manufacturers who had been accustomed to sell to the plaintiffs were members. The nonmember dealer was also prevented by the agreement from buying tiles of a dealer in San Francisco who was a member, excepting at a greatly enhanced price over what he would have paid to the

manufacturer or to any San Francisco dealer who was a member, if he, the purchaser, were also a member of the association. The agreement, therefore, restrained trade, for it narrowed the market for the sale of tile in California from the manufacturers and dealers therein in other states, so that they could only be sold to the members of the association, and it enhanced prices to the nonmember as already stated.

The plaintiffs endeavored in vain to procure tile for the purposes of their business from these tile manufacturers, but the latter refused to deal with them because plaintiffs were not members of the association. It is not the simple case of manufacturers of an article of commerce between the several states refusing to sell to certain other persons. The agreement is between manufacturers and dealers belonging to an association in which the dealers agree not to purchase from manufacturers not members of the association, and not to sell unset tile to any one not a member of the association for less than list prices, which are more than 50 per cent higher than the prices would be to those who were members, while the manufacturers who became members agreed not to sell to anyone not a member, and in case of a violation of the agreement they were subject to forfeiting their membership. By reason of this agreement, therefore, the market for tile is, as we have said, not only narrowed, but the prices charged by the San Francisco dealers for the unset tile to those not members of the association are more than doubled. It is urged that the sale of unset tile, provided for in the seventh section of the by-laws, is a transaction wholly within the state of California and is not in any event a violation of the act of Congress which applies only to commerce between the states. The provision as to this sale is but a part of the agreement, and it is so united with the rest as to be incapable of separation without at the same time altering the general purpose of the agreement. The whole agreement is to be construed as one piece, in which the manufacturers are parties as well as the San Francisco dealers, and the refusal to sell on the part of the manufacturers is connected with and a part of the scheme which includes the enhancement of the price of the unset tile by the San Francisco dealers. The whole thing is so bound together that when looked at as a whole the sale of unset tile

ceases to be a mere transaction in the state of California, and becomes part of a purpose which, when carried out, amounts to and is a contract or combination in restraint of interstate trade or commerce.

Again, it is contended the sale of unset tile is so small in San Francisco as to be a negligible quantity; that it does not amount to 1 per cent of the business of the dealers in tile in that city. The amount of trade in the commodity is not very material, but even though such dealing heretofore has been small, it would probably largely increase when those who formerly purchased tile from the manufacturers are shut out by reason of the association and their nonmembership therein from purchasing their tile from those manufacturers, and are compelled to purchase them from the San Francisco dealers. Either the extent of the trade in unset tile would increase between the members of the association and outsiders, or else the latter would have to go out of business, because unable to longer compete with their rivals who were members. In either event, the combination, if carried out, directly effects a restraint of interstate commerce.

It is also contended that, as the expressed object of the association was to unite therein all the dealers in San Francisco and vicinity, the plaintiffs had nothing more to do than join the association, pay their fees and dues, and become like one of the other members. It was not, however, a matter of course to permit any dealer to join. The constitution only provided for "all acceptable dealers" joining the association. As plaintiffs were not invited to be among its founders, it would look as if they were not regarded as acceptable. However that may be, they never subsequently to its formation applied for admission. It is plain that the question of their admission, if they had so applied, was one to be arbitrarily determined by the association. The constitution provided for the appointment of an executive committee, whose duty it was to examine all applications for membership in and to report on the same to the association, after which it was to decide whether the applicants should be admitted or not. If they were not acceptable, the applicant would not be admitted, and whether they were or not was a matter for the arbitrary decision of

the association. Its decision that they were not acceptable was sufficient to bar their entrance.

Again, it appears that plaintiffs were not eligible under the constitution because they did not always carry stock worth \$3,000, which, by § 1 of article I., was made a condition of eligibility to membership. True, it was stated in evidence that this provision had not been enforced, but there was no averment or proof that it had been repealed, and there was nothing to prevent its enforcement at any time that an application was made by anyone who could not come up to the condition. The case stands, therefore, that the plaintiffs had not been asked to join the association at its formation; that they did not fill the condition provided for in its constitution as to eligibility, and that if they had applied their application was subject to arbitrary rejection.

The plaintiffs, however, could not, by virtue of any agreement contained in such association, be legally put under obligation to become members in order to enable them to transact their business as they had theretofore done, and to purchase tile as they had been accustomed to do before the association was formed.

The consequences of nonmembership were grave, if not disastrous, to the plaintiffs. It has already been shown how the prices of tile were enhanced so far as plaintiffs were concerned, and how, by means of this combination, interstate commerce was affected.

The purchase and sale of tile between the manufacturers in one state and dealers therein in California was interstate commerce within the Addystone Pipe Case, 175 U. S. 211, 44 L. ed. 136. It was not a combination or monopoly among manufacturers simply, but one between them and dealers in the manufactured article, which was an article of commerce between the states. *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, did not, therefore, cover it. It is not brought within either *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, or *Anderson v. United States*, 171 U. S. 604, 43 L. ed. 300. In the first case it was held that the occupation of the members of the association was not interstate commerce, and in the other that the subject-matter of the agreement did not directly relate to, embrace, or act upon interstate commerce,

for the reasons which are therein stated at length. Upon examination we think it is entirely clear that the facts in the case at bar bear no resemblance to the facts set forth in either of the above cases and are not within the reasoning of either. The agreement directly affected and restrained interstate commerce.

The case we regard as a plain one and it is unnecessary to further enlarge upon it.

There is one other question which, although of secondary importance, is raised by the plaintiffs in error. After the rendition of the verdict the plaintiffs below claimed a reasonable attorney's fee under the seventh section of the act, and made proof of what would be a reasonable sum therefor, from which it appeared that it would be from \$750 to \$1,000. The trial court awarded to the plaintiffs \$750. The verdict being only for \$500, the plaintiffs in error claimed that the allowance was an improper and unreasonable one. The trial took some five days. The judgment in effect pronounced the association illegal. The amount of the attorney's fee was within the discretion of the trial court, reasonably exercised, and we do not think that in this case such discretion was abused.

The judgment is affirmed.

SWIFT & COMPANY v. UNITED STATES

(Supreme Court of United States, 1905. 196 U. S. 375.)

MR. JUSTICE HOLMES ²² delivered the opinion of the court:

This is an appeal from a decree of the circuit court, on demurrer, granting an injunction against the appellants' commission of alleged violations of the act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), "to Protect Trade and Commerce against Unlawful Restraints and Monopolies." It will be necessary to consider both the bill and the decree. The bill is brought against a number of corporations, firms, and individuals of different states, and makes the following allegations: 1. The defendants (appell-

²²—Only the opinion of the court is given.

lants) are engaged in the business of buying live stock at the stock yards in Chicago, Omaha, St. Joseph, Kansas City, East St. Louis, and St. Paul, and slaughtering such live stock at their respective plants in places named, in different states, and converting the live stock into fresh meat for human consumption. 2. The defendants "are also engaged in the business of selling such fresh meats, at the several places where they are so prepared, to dealers and consumers in divers states and territories of the said United States other than those wherein the said meats are so prepared and sold as aforesaid, and in the District of Columbia, and in foreign countries, and shipping the same meats, when so sold, from the said places of their preparation, over the several lines of transportation of the several railroad companies serving the same as common carriers, to such dealers and consumers, pursuant to such sales." 3. The defendants also are engaged in the business of shipping such fresh meats to their respective agents at the principal markets in other states, etc., for sale by those agents in those markets to dealers and consumers. 4. The defendants together control about six tenths of the whole trade and commerce in fresh meats among the states, territories, and District of Columbia, and, 5, but for the acts charged would be in free competition with one another.

6. In order to restrain competition among themselves as to the purchase of live stock, defendants have engaged in, and intend to continue, a combination for requiring, and do and will require, their respective purchasing agents at the stock yards mentioned, where defendants buy their live stock (the same being stock produced and owned principally in other states and shipped to the yards for sale), to refrain from bidding against each other, "except perfunctorily and without good faith," and by this means compelling the owners of such stock to sell at less prices than they would receive if the bidding really was competitive.

7. For the same purposes the defendants combine to bid up, through their agents, the prices of live stock for a few days at a time, "so that the market reports will show prices much higher than the state of the trade will warrant," thereby inducing stock owners in other states to make large shipments to the stock yards, to their disadvantage.

8. For the same purposes, and to monopolize the commerce protected by the statute, the defendants combine "to arbitrarily, from time to time, raise, lower, and fix prices, and to maintain uniform prices at which they will sell" to dealers throughout the states. This is effected by secret periodical meetings, where are fixed prices to be enforced until changed at a subsequent meeting. The prices are maintained directly, and by collusively restricting the meat shipped by the defendants, whenever conducive to the result, by imposing penalties for deviations, by establishing a uniform rule for the giving of credit to dealers, etc., and by notifying one another of the delinquencies of such dealers, and keeping a black list of delinquents, and refusing to sell meats to them.

9. The defendants also combine to make uniform charges for cartage for the delivery of meats sold to dealers and consumers in the markets throughout the states, etc., shipped to them by the defendants through the defendants' agents at the markets, when no charges would have been made but for the combination.

10. Intending to monopolize the said commerce, and to prevent competition therein, the defendants "have all and each engaged in and will continue" arrangements with the railroads whereby the defendants received, by means of rebates and other devices, rates less than the lawful rates for transportation, and were exclusively to enjoy and share this unlawful advantage to the exclusion of competition and the public. By force of the consequent inability of competitors to engage or continue in such commerce, the defendants are attempting to monopolize, have monopolized, and will monopolize, the commerce in live stock and fresh meats among the states and territories and with foreign countries, and, 11, the defendants are and have been in conspiracy with each other, with the railroad companies, and others unknown, to obtain a monopoly of the supply and distribution of fresh meats throughout the United States, etc. And to that end defendants artificially restrain the commerce and put arbitrary regulations in force affecting the same from the shipment of the live stock from the plains to the final distribution of the meats to the consumer. There is a prayer for an injunction of the most comprehensive sort, against all the foregoing proceedings and

others, for discovery of books and papers relating directly or indirectly to the purchase or shipment of live stock, and the sale or shipment of fresh meat, and for an answer under oath. The injunction issued is appended in a note.²³

To sum up the bill more shortly, it charges a combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against each other in the live-stock markets of the different states, to bid up prices for a few days in order to induce the cattle men to send their stock to the stock yards, to fix prices at which they will sell, and to that end to restrict shipments of meat when necessary, to establish a uniform rule of credit to dealers, and to keep a black list, to make uniform and improper charges for cartage, and finally to get less than lawful rates from the railroads, to the exclusion of competitors. It is true that the last charge is not clearly stated to be a part of the combination. But as it

23—"And now, upon motion of the said attorney, the court doth order that the preliminary injunction heretofore awarded in this cause, to restrain the said defendants and each of them, their respective agents and attorneys, and all other persons acting in their behalf, or in behalf of either of them, or claiming so to act, from entering into, taking part in, or performing any contract, combination, or conspiracy, the purpose or effect of which will be, as to trade and commerce in fresh meats between the several states and territories and the District of Columbia, a restraint of trade, in violation of the provisions of the act of Congress approved July 2, 1890, entitled 'An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies,' either by directing or requiring their respective agents to refrain from bidding against each other in the purchase of live stock; or collusively, and by agreement, to refrain from bidding against each other at the sales of live stock; or,

by combination, conspiracy, or contract, raising or lowering prices or fixing uniform prices at which the said meats will be sold, either directly or through their respective agents; or by curtailing the quantity of such meats shipped to such markets and agents; or by establishing and maintaining rules for the giving of credit to dealers in such meats, the effect of which rules will be to restrict competition; or by imposing uniform charges for cartage and delivery of such meats to dealers and consumers, the effect of which will be to restrict competition; or by any other method or device, the purpose and effect of which is to restrain commerce as aforesaid; and also from violating the provisions of the act of Congress approved July 2, 1890, entitled 'An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies,' by combining or conspiring together, or with each other and others, to monopolize or attempt to monopolize any part of the trade and commerce

is alleged that the defendants have each and all made arrangements with the railroads, that they were exclusively to enjoy the unlawful advantage, and that their intent in what they did was to monopolize the commerce and to prevent competition, and in view of the general allegation to which we shall refer, we think that we have stated correctly the purport of the bill. It will be noticed further that the intent to monopolize is alleged for the first time in the 8th section of the bill as to raising, lowering, and fixing prices. In the earlier sections, the intent alleged is to restrain competition among themselves. But, after all the specific charges, there is a general allegation that the defendants are conspiring with one another, the railroads and others, to monopolize the supply and distribution of fresh meat throughout the United States, etc., as has been stated above, and it seems to us that this general

in fresh meats among the several states and territories and the District of Columbia, by demanding, obtaining, or, with or without the connivance of the officers or agents thereof, or any of them, receiving from railroad companies or other common carriers transporting such fresh meats in such trade and commerce, either directly or by means of rebates, or by any other device, transportation of or for such meats, from the points of the preparation and production of the same from live stock or elsewhere, to the markets for the sale of the same to dealers and consumers in other states and territories than those wherein the same are so prepared, or the District of Columbia, at less than the regular rates which may be established or in force on their several lines of transportation, under the provisions in that behalf of the laws of the said United States for the regulation of commerce, be, and the same is hereby, made perpetual.

“But nothing herein shall be construed to prohibit the said defend-

ants from agreeing upon charges for cartage and delivery, and other incidents connected with local sales, where such charges are not calculated to have any effect upon competition in the sales and delivery of meats; nor from establishing and maintaining rules for the giving of credit to dealers where such rules in good faith are calculated solely to protect the defendants against dishonest or irresponsible dealers, nor from curtailing the quantity of meats shipped to a given market where the purpose of such arrangement in good faith is to prevent the over-accumulation of meats as perishable articles in such markets.

“Nor shall anything herein contained be construed to restrain or interfere with the action of any single company or firm, by its or their officers or agents (whether such officers or agents are themselves personally made parties defendant hereto or not), acting with respect to its or their own corporate or firm business, property, or affairs.”

allegation of intent colors and applies to all the specific charges of the bill. Whatever may be thought concerning the proper construction of the statute, a bill in equity is not to be read and construed as an indictment would have been read and construed a hundred years ago, but it is to be taken to mean what it fairly conveys to a dispassionate reader by a fairly exact use of English speech. Thus read this bill seems to us intended to allege successive elements of a single connected scheme.

We read the demurrer with the same liberality. Therefore we take it as applying to the bill generally for multifariousness and want of equity, and also to each section of it which makes a charge, and to the discovery. The demurrer to the discovery will not need discussion in the view which we take concerning the relief, and therefore we turn at once to that.

The general objection is urged that the bill does not set forth sufficient definite or specific facts. This objection is serious, but it seems to us inherent in the nature of the case. The scheme alleged is so vast that it presents a new problem in pleading. If, as we must assume, the scheme is entertained, it is, of course, contrary to the very words of the statute. Its size makes the violation of the law more conspicuous, and yet the same thing makes it impossible to fasten the principal fact to a certain time and place. The elements, too, are so numerous and shifting, even the constituent parts alleged are, and from their nature must be, so extensive in time and space, that something of the same impossibility applies to them. The law has been upheld, and therefore we are bound to enforce it notwithstanding these difficulties. On the other hand, we equally are bound, by the first principles of justice, not to sanction a decree so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt. We cannot issue a general injunction against all possible breaches of the law. We must steer between these opposite difficulties as best we can.

The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately, when we take them up as distinct charges,

they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful, and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful. *Aikens v. Wisconsin*, 195 U. S. 194, 206, 49 L. ed. 154. The statute gives this proceeding against combinations in restraint of commerce among the states and against attempts to monopolize the same. Intent is almost essential to such a combination, and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent,—for instance, the monopoly,—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Com. v. Peaslee*, 177 Mass. 267, 272. But when that intent and the consequent dangerous probability exist, this statute, like many others, and like the common law in some cases, directs itself again that dangerous probability as well as against the completed result. What we have said disposes incidentally of the objection to the bill as multifarious. The unity of the plan embraces all the parts.

One further observation should be made. Although the combination alleged embraces restraint and monopoly of trade within a single state, its effect upon commerce among the states is not accidental, secondary, remote, or merely probable. On the allegations of the bill the latter commerce no less, perhaps even more, than commerce within a single state, is an object of attack. See *Leloup v. Port of Mobile*, 127, U. S. 640, 647, 32 L. ed. 311, 314, 2 Inters. Com. Rep. 134; *Crutcher v. Kentucky*, 141 U. S. 47, 59, 35 L. ed. 649, 652; *Allen v. Pullman's Palace Car Co.* 191 U. S. 171, 179, 180, 48 L. ed. 134, 138. Moreover, it is a direct object; it is that for the sake of which the several specific acts and courses of conduct are done and adopted. Therefore the case is not like *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, where the subject-matter of the combination was manufacture, and the direct object monopoly of manufacture within a state. However likely monopoly of commerce among the states in the article manufactured was to follow from the agreement, it was not a necessary consequence nor a primary end. Here the

subject-matter is sales, and the very point of the combination is to restrain and monopolize commerce among the states in respect to such sales. The two cases are near to each other, as sooner or later always must happen where lines are to be drawn, but the line between them is distinct. *Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. ed. 608.

So, again, the line is distinct between this case and *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40. All that was decided there was that the local business of commission merchants was not commerce among the states, even if what the brokers were employed to sell was an object of such commerce. The brokers were not like the defendants before us, themselves the buyers and sellers. They only furnished certain facilities for the sales. Therefore, there again the effects of the combination of brokers upon the commerce was only indirect, and not within the act. Whether the case would have been different if the combination had resulted in exorbitant charges was left open. In *Anderson v. United States*, 171 U. S. 604, 43 L. ed. 300, the defendants were buyers and sellers at the stock yards, but their agreement was merely not to employ brokers, or to recognize yard-traders, who were not members of their association. Any yard-trader could become a member of the association on complying with the conditions, and there was said to be no feature of monopoly in the case. It was held that the combination did not directly regulate commerce between the states, and, being formed with a different intent, was not within the act. The present case is more like *Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. ed. 608.

For the foregoing reasons we are of opinion that the carrying out of the scheme alleged, by the means set forth, properly may be enjoined, and that the bill cannot be dismissed.

So far it has not been necessary to consider whether the facts charged in any single paragraph constitute commerce among the states or show an interference with it. There can be no doubt, we apprehend, as to the collective effect of all the facts, if true, and if the defendants entertain the intent alleged. We pass now to the particulars, and will consider the corresponding parts of the injunction at the same time. The first question arises on the 6th section. That charges a com-

bination of independent dealers to restrict the competition of their agents when purchasing stock for them in the stock yards. The purchasers and their slaughtering establishments are largely in different states from those of the stock yards, and the sellers of the cattle, perhaps it is not too much to assume, largely in different states from either. The intent of the combination is not merely to restrict competition among the parties, but, as we have said, by force of the general allegation at the end of the bill, to aid in an attempt to monopolize commerce among the states.

It is said that this charge is too vague and that it does not set forth a case of commerce among the states. Taking up the latter objection first, commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce. What we say is true at least of such a purchase by residents in another state from that of the seller and of the cattle. And we need not trouble ourselves at this time as to whether the statute could be escaped by any arrangement as to the place where the sale in point of law is consummated. See *Norfolk & W. R. Co. v. Sims*, 191 U. S. 441, 48 L. ed. 254. But the 6th section of the bill charges an interference with such sales, a restraint of the parties by mutual contract, and a combination not to compete in order to monopolize. It is immaterial if the section also embraces domestic transactions.

It should be added that the cattle in the stock yard are not at rest even to the extent that was held sufficient to warrant taxation in *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 48 L. ed. 538. But it may be that the question of taxation does not depend upon whether the article taxed may or may not be said to be in the course of commerce between the states, but depends upon whether the tax so far affects that commerce as to amount to a regulation of it. The injunction against

taking part in a combination, the effect of which will be a restraint of trade among the states, by directing the defendants' agents to refrain from bidding against one another at the sales of live stock, is justified so far as the subject-matter is concerned.

The injunction, however, refers not to trade among the states in cattle, concerning which there can be no question of original packages, but to trade in fresh meats, as the trade forbidden to be restrained, and it is objected that the trade in fresh meats described in the 2d and 3d sections of the bill is not commerce among the states, because the meat is sold at the slaughtering places, or, when sold elsewhere, may be sold in less than the original packages. But the allegations of the 2d section, even if they import a technical passing of title at the slaughtering places, also import that the sales are to persons in other states, and that the shipments to other states are part of the transaction,—“pursuant to such sales,”—and the 3d section imports that the same things which are sent to agents are sold by them, and sufficiently indicates that some, at least, of the sales, are of the original packages. Moreover, the sales are by persons in one state to persons in another. But we do not mean to imply that the rule which marks the point at which state taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the states. Nor do we mean to intimate that the statute under consideration is limited to that point. Beyond what we have said above, we leave those questions as we find them. They were touched upon in *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. ed. 679.

We are of opinion, further, that the charge in the 6th section is not too vague. The charge is not of a single agreement, but of a course of conduct intended to be continued. Under the act it is the duty of the court, when applied to, to stop the conduct. The thing done and intended to be done is perfectly definite: with the purpose mentioned, directing the defendants' agents and inducing each other to refrain from competition in bids. The defendants cannot be ordered to compete, but they properly can be forbidden to give directions or to make agreements not to compete. See *Addyston Pipe & Steel Co. v.*

United States, 175 U. S. 211, 44 L. ed. 136. The injunction follows the charge. No objection was made on the ground that it is not confined to the places specified in the bill. It seems to us, however, that it ought to set forth more exactly the transactions in which such directions and agreements are forbidden. The trade in fresh meat referred to should be defined somewhat as it is in the bill, and the sales of stock should be confined to sales of stock at the stock yards named, which stock is sent from other states to the stock yards for sale, or is bought at those yards for transport to another state.

After what we have said, the 7th, 8th, and 9th sections need no special remark, except that the cartage referred to in § 9 is not an independent matter, such as was dealt in in *New York ex rel. Pennsylvania R. Co. v. Knight*, 192 U. S. 21, 48 L. ed. 325, but a part of the contemplated transit,—cartage for delivery of the goods. The general words of the injunction “or by any other method or device, the purpose and effect of which is to restrain commerce as aforesaid,” should be stricken out. The defendants ought to be informed, as accurately as the case permits, what they are forbidden to do. Specific devices are mentioned in the bill, and they stand prohibited. The words quoted are a sweeping injunction to obey the law, and are open to the objection which we stated at the beginning, that it was our duty to avoid. To the same end of definiteness, so far as attainable, the words “as charged in the bill,” should be inserted between “dealers in such meats,” and “the effect of which rules,” and two lines lower, as to charges for cartage, the same words should be inserted between “dealers and consumers” and “the effect of which.”

The acts charged in the 10th section, apart from the combination and the intent, may, perhaps, not necessarily be unlawful, except for the adjective which proclaims them so. At least we may assume, for purposes of decision, that they are not unlawful. The defendants severally lawfully may obtain less than the regular rates for transportation if the circumstances are not substantially similar to those for which the regular rates are fixed. Act of Feb. 4, 1887, 24 Stat. at L. 379, chap. 104, § 2, U. S. Comp. Stat. 1901, p. 3155. It may be that the regular rates are fixed for carriage in cars furnished by the railroad companies, and that the defendants furnish their

own cars and other necessities of transportation. We see nothing to hinder them from combining to that end. We agree, as we already have said, that such a combination may be unlawful as part of the general scheme set forth in the bill, and that this scheme as a whole might be enjoined. Whether this particular combination can be enjoined, as it is, apart from its connection with the other elements, if entered into with the intent to monopolize, as alleged, is a more delicate question. The question is how it would stand if the 10th section were the whole bill. Not every act that may be done with intent to produce an unlawful result is unlawful, or constitutes an attempt. It is a question of proximity and degree. The distinction between mere preparation and attempt is well known in the criminal law. *Com. v. Peaslee*, 177 Mass. 267, 272. The same distinction is recognized in cases like the present. *United States v. E. C. Knight Co.* 156 U. S. 1, 13, 39 L. ed. 325, 329; *Kidd v. Pearson*, 128 U. S. 1, 23, 24, 32 L. ed. 346, 351, 2 Inters. Com. Rep. 232. We are of opinion, however, that such a combination is within the meaning of the statute. It is obvious that no more powerful instrument of monopoly could be used than an advantage in the cost of transportation. And even if the advantage is one which the act of 1887 permits, which is denied, perhaps inadequately, by the adjective "unlawful," still a combination to use it for the purpose prohibited by the act of 1890 justifies the adjective, and takes the permission away.

It only remains to add that the foregoing question does not apply to the earlier sections, which charge direct restraints of trade within the decisions of the court, and that the criticism of the decree, as if it ran generally against combinations in restraint of trade or to monopolize trade, ceases to have any force when the clause against "any other method or device" is stricken out. So modified it restrains such combinations only to the extent of certain specified devices, which the defendants are alleged to have used and intend to continue to use.

Decree modified and affirmed.

UNITED STATES v. KISSEL and HARNED

(Supreme Court of United States, 1910. 218 U. S. 601.)

MR. JUSTICE HOLMES ²⁴ delivered the opinion of the court:

This is a writ of error brought by the United States to reverse a judgment of the circuit court, sustaining pleas in bar, pleaded to an indictment by the defendants in error. 173 Fed. 823. The first count of the indictment alleges that the defendants in error and others named, on December 30, 1903, and from that day until the day of presenting the indictment (July 1, 1909), have engaged in an unlawful conspiracy in restraint of trade in refined sugar among the several states of the Union; that is to say, to eliminate free competition and prevent all competition with the American Sugar Refining Company, one of the defendants, by a would-be competitor, the Pennsylvania Sugar Refining Company. It then sets forth, at length, the means by which the alleged purpose was to be accomplished, and what are put forward as overt acts done in pursuance of the plan. In other counts, referring to the first, the defendants are alleged to have conspired to monopolize the trade in refining sugar among the states. There are similar counts as to the trade in raw sugar and molasses, and as to trade with foreign nations. The offenses aimed at, of course, are the conspiracies punished by the act of July 2, 1890, chap. 647, 26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3200, commonly known as the Sherman act.

There are other counts in the indictment, but the argument was devoted mainly to these. The defendants severally pleaded to all of them the limitation of three years fixed by Rev. Stat. § 1044, U. S. Comp. Stat. 1901, p. 175, alleging that for more than three years before the finding of the indictment on July 1, 1909, they did not engage in, or do any act in aid of, such conspiracies. The defendant Kissel added averments that all the overt acts alleged to have been done within three years before July 1, 1909, were done without his participation, consent, or knowledge. He also pleaded that since October 6, 1906, the Pennsylvania Sugar Refining Company had been in the hands of a duly appointed receiver.

²⁴—Only the opinion of the court is given.

We deem it unnecessary to state the pleadings with more particularity, because the only question before us under the act of March 2, 1907, chap. 2564, 34 Stat. at L. 1246, U. S. Comp. Stat. Supp. 1909, p. 220, is whether the plea in bar can be sustained. That this court is confined to a consideration of the grounds of decision mentioned in the statute when an indictment is quashed was decided in *United States v. Keitel*, 211 U. S. 370, 399, 53 L. ed. 230, 245. We think that there is a similar limit when the case comes up under the other clause of the act, from a "judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy." This being so, we are not concerned with the technical sufficiency or redundancy of the indictment, or even, in the view that we presently shall express, with any consideration of the nature of the overt acts alleged. The indictment charges a conspiracy beginning in 1903, but continuing down to the date of filing. It pretty nearly was conceded that if a conspiracy of this kind can be continuous, then the pleas in bar are bad. Therefore we first will consider whether a conspiracy can have continuance in time.

The defendants argue that a conspiracy is a completed crime as soon as formed, that it is simply a case of unlawful agreement, and that therefore the *continuando* may be disregarded, and a plea is proper to show that the statute of limitations has run. Subsequent acts in pursuance of the agreement may renew the conspiracy or be evidence of a renewal, but do not change the nature of the original offense. So also, it is said, the fact that an unlawful contract contemplates future acts, or that the results of a successful conspiracy endure to a much later date, does not affect the character of the crime.

The argument, so far as the premises are true, does not suffice to prove that a conspiracy, although it exists as soon as the agreement is made, may not continue beyond the moment of making it. It is true that the unlawful agreement satisfies the definition of the crime, but it does not exhaust it. It also is true, of course, that the mere continuance of the result of a crime does not continue the crime. *United States v. Irvine*, 98 U. S. 450, 25 L. ed. 193, 3 Am. Crim. Rep. 334. But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous co-operation

of the conspirators to keep it up, and there is such continuous co-operation, it is a perversion of natural thought and of natural language to call such continuous co-operation a cinematographic series of distinct conspiracies, rather than to call it a single one. Take the present case. A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates that the conspirators will remain in business, and will continue their combined efforts to drive the competitor out until they succeed. If they do continue such efforts in pursuance of the plan, the conspiracy continues up to the time of abandonment or success. A conspiracy in restraint of trade is different from and more than a contract in restraint of trade. A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract, but is a result of it. The contract is instantaneous, the partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes. That as such it may have continuation in time is shown by the rule that an overt act of one partner may be the act of all without any new agreement specifically directed to that act.

The means contemplated for the exclusion of the Pennsylvania Sugar Refining Company were the making of a large loan by the American Sugar Refining Company through Kissel to one Segal, and the receiving from him of more than half the stock of the Pennsylvania Company, with a power of attorney to vote upon it, Segal not knowing that the American Company was behind Kissel. The loan was to be for a year, but the American Company was to use the power of voting to prevent the Pennsylvania Company from going on with its business, and, as Segal was dependent largely upon the returns from that company for means of repaying the loan, he was to be prevented from repaying it, and the control of the Pennsylvania Company retained until it should be ruined and finally driven from business. It is alleged that the loan was made, and that a vote was passed that the Pennsylvania Company refrain from business until further order of the board of directors. Now, of course, it well may be that the object was so far accomplished by this vote that the conspiracy was at

an end; but a vote upon pledged stock that might be redeemed was not necessarily lasting, and further action might be necessary to reach the desired result. The allegation that the conspiracy continued down to the date of the indictment is not contradicted by the vote. Furthermore, as we have said, the only question here is whether the plea of the statute of limitations is good.

Taking it that the conspiracies made criminal by the act of July 2, 1890, may have continuance, we are of opinion that the pleas are bad. To be sure, it still might be argued that the general rule that time need not be proved as laid applies to continuing offenses, that therefore the allegation in the indictment, so far as it specifies the time in which the conspiracy was maintained, is immaterial, and that a plea traversing only that is, in substance, a plea in confession and avoidance, and good. Whether, in a charge of a continuing offense, even such specific earmarks of time as those in this indictment make it enter into the essence of the offense, we shall not discuss. Time is held to be of the essence in Massachusetts and some other states (*Com. v. Pray*, 13 Pick. 359, 364; *Com. v. Briggs*, 11 Met. 573; *State v. Small*, 80 Me. 452; *Fleming v. State*, 28 Tex. App. 234); while this has been thought to be a local peculiarity, and the contrary has been decided elsewhere (*State v. Reno*, 41 Kan. 674, 682, 683; *State v. Arnold*, 98 Iowa, 253; *Bishop*, New Crim. Proc. §§ 397, 402). However this may be, if the plea of the statute of limitations is good where it confesses and avoids all that the indictment avers, still, as was pointed out in an able brief by the late lamented Solicitor General, it is open to too many objections and difficulties to be encouraged or allowed except in clear cases. Apart from technical rules, the averments of time in the indictment are expected and intended to be proved as laid. The overt acts relied upon coming down to within three years of the indictment are alleged to have been done in pursuance of the conspiracy, and the pleas must be taken to deny that allegation, unless they rely upon the supposed impossibility of the acts having the character alleged. It is only by an artificial rule, if at all, that the plea can be treated as not traversing the indictment, and we are not prepared to give that supposed rule such an effect.

The discussion at the bar took a wider range than is open at this stage. It hardly is necessary to explain that we have nothing to say as to what evidence would be sufficient to prove the continuation of the conspiracy, or where the burden of pleading or proof as to abandonment would be. We deal only with a naked and highly technical question, when once the possibility of continuation is established, and as to that we cannot bring ourselves to doubt.

To sum up and repeat: The indictment charges a continuing conspiracy. Whether it does so with technical sufficiency is not before us. All that we decide is that a conspiracy may have continuance in time, and that where, as here, the indictment, consistently with the other facts, alleges that it did so continue to the date of filing, that allegation must be denied under the general issue, and not by a special plea. Under the general issue all defenses, including the defense that the conspiracy was ended by success, abandonment, or otherwise, more than three years before July 1, 1909, will be open and unaffected by what we now decide.

Judgment reversed.

STANDARD OIL COMPANY v. UNITED STATES.

(Supreme Court of United States, 1911. 221 U. S. 1.)

MR. CHIEF JUSTICE WHITE²⁵ delivered the opinion of the court:

The Standard Oil Company of New Jersey and thirty-three other corporations, John D. Rockefeller, William Rockefeller, and five other individual defendants, prosecute this appeal to reverse a decree of the court below. Such decree was entered upon a bill filed by the United States under authority of § 4 of the act of July 2, 1890 [Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3201], known as the anti-trust act, and had for its object the enforcement of the provisions of that act. The record is inordinately voluminous, consisting of twenty-three

²⁵—Only the opinion of the court is given.

volumes of printed matter, aggregating about 12,000 pages, containing a vast amount of confusing and conflicting testimony relating to innumerable, complex, and varied business transactions, extending over a period of nearly forty years. In an effort to pave the way to reach the subjects which we are called upon to consider, we propose at the outset, following the order of the bill, to give the merest possible outline of its contents, to summarize the answer, to indicate the course of the trial, and point out briefly the decision below rendered.

The bill and exhibits, covering 170 pages of the printed record, was filed on November 15, 1906. Corporations known as Standard Oil Company of New Jersey, Standard Oil Company of California, Standard Oil Company of Indiana, Standard Oil Company of Iowa, Standard Oil Company of Kansas, Standard Oil Company of Kentucky, Standard Oil Company of Nebraska, Standard Oil Company of New York, Standard Oil Company of Ohio, and sixty-two other corporations and partnerships, as also seven individuals, were named as defendants. The bill was divided into thirty numbered sections, and sought relief upon the theory that the various defendants were engaged in conspiring "to restrain the trade and commerce in petroleum, commonly called 'crude oil,' in refined oil, and in the other products of petroleum, among the several states and territories of the United States and the District of Columbia and with foreign nations, and to monopolize the said commerce." The conspiracy was alleged to have been formed in or about the year 1870 by three of the individual defendants, *viz.*: John D. Rockefeller, William Rockefeller, and Henry M. Flagler. The detailed averments concerning the alleged conspiracy were arranged with reference to three periods, the first from 1870 to 1882, and the second from 1882 to 1899, and the third from 1899 to the time of the filing of the bill.

The general charge concerning the period from 1870 to 1882 was as follows:

"That during said first period the said individual defendants, in connection with the Standard Oil Company of Ohio, purchased and obtained interests through stock ownership and otherwise in, and entered into agreements with, various persons, firms, corporations, and limited partnerships engaged in

purchasing, shipping, refining, and selling petroleum and its products among the various states, for the purpose of fixing the price of crude and refined oil and the products thereof, limiting the production thereof, and controlling the transportation therein, and thereby restraining trade and commerce among the several states, and monopolizing the said commerce."

To establish this charge it was averred that John D. and William Rockefeller and several other named individuals, who, prior to 1870, composed three separate partnerships engaged in the business of refining crude oil and shipping its products in interstate commerce, organized in the year 1870 a corporation known as the Standard Oil Company of Ohio, and transferred to that company the business of the said partnerships, the members thereof becoming, in proportion to their prior ownership, stockholders in the corporation. It was averred that the other individual defendants soon afterwards became participants in the illegal combination, and either transferred property to the corporation or to individuals, to be held for the benefit of all parties in interest in proportion to their respective interests in the combination; that is, in proportion to their stock ownership in the Standard Oil Company of Ohio. By the means thus stated, it was charged that by the year 1872, the combination had acquired substantially all but three or four of the thirty-five or forty oil refineries located in Cleveland, Ohio. By reason of the power thus obtained, and in further execution of the intent and purpose to restrain trade and to monopolize the commerce, interstate as well as intrastate, in petroleum and its products, the bill alleged that the combination and its members obtained large preferential rates and rebates in many and devious ways over their competitors from various railroad companies, and that by means of the advantage thus obtained many, if not virtually all, competitors were forced either to become members of the combination or were driven out of business; and thus, it was alleged, during the period in question, the following results were brought about: (a) That the combination, in addition to the refineries in Cleveland which it had acquired, as previously stated, and which it had either dismantled to limit production, or continued to operate, also

from time to time acquired a large number of refineries of crude petroleum, situated in New York, Pennsylvania, Ohio, and elsewhere. The properties thus acquired, like those previously obtained, although belonging to and being held for the benefit of the combination, were ostensibly divergently controlled, some of them being put in the name of the Standard Oil Company of Ohio, some in the name of corporations or limited partnerships affiliated therewith, or some being left in the name of the original owners, who had become stockholders in the Standard Oil Company of Ohio, and thus members of the alleged illegal combination. (b) That the combination had obtained control of the pipe lines available for transporting oil from the oil fields to the refineries in Cleveland, Pittsburg, Titusville, Philadelphia, New York, and New Jersey. (c) That the combination during the period named had obtained a complete mastery over the oil industry, controlling 90 per cent of the business of producing, shipping, refining, and selling petroleum and its products, and thus was able to fix the price of crude and refined petroleum, and to restrain and monopolize all interstate commerce in those products.

The averments bearing upon the second period (1882 to 1899) had relation to the claim:

“That during the said second period of conspiracy the defendants entered into a contract and trust agreement, by which various independent firms, corporations, limited partnerships, and individuals engaged in purchasing transporting, refining, shipping, and selling oil and the products thereof among the various states, turned over the management of their said business, corporations, and limited partnerships to nine trustees, composed chiefly of certain individuals defendant herein, which said trust agreement was in restraint of trade and commerce, and in violation of law, as herein-after more particularly alleged.”

The trust agreement thus referred to was set out in the bill. It was made in January, 1882. By its terms the stock of forty corporations, including the Standard Oil Company of Ohio, and a large quantity of various properties which had been previously acquired by the alleged combination, and which was held in diverse forms, as we have previously indicated,

for the benefit of the members of the combination, was vested in the trustees and their successors, "to be held for all parties in interest jointly." In the body of the trust agreement was contained a list of the various individuals and corporations and limited partnerships whose stockholders and members, or a portion thereof, became parties to the agreement. This list is in the margin.²⁶

The agreement made provision for the method of controlling and managing the property by the trustees, for the formation of additional manufacturing, etc., corporations in various states, and the trust, unless terminated by a mode specified, was to continue "during the lives of the survivors and survivor of the trustees named in the agreement and for twenty-one years thereafter." The agreement provided for the issue of Standard Oil Trust certificates to represent the interest arising under the trust in the properties affected by the trust, which, of course, in view of the provisions of the agreement

26—1st. All the stockholders and members of the following corporations and limited partnerships, to wit:

Acme Oil Company, New York.
Acme Oil Company, Pennsylvania.
Atlantic Refining Company of Philadelphia.

Bush & Company (Limited).
Camden Consolidated Oil Company.

Elizabethport Acid Works.
Imperial Refining Company (Limited).

Charles Pratt & Company.
Paine, Ablett & Company.
Standard Oil Company, Ohio.
Standard Oil Company, Pittsburg.
Smith's Ferry Oil Transportation Company.

Solar Oil Company (Limited).
Stone & Fleming Manufacturing Company (Limited).

Also all the stockholders and members of such other corporations and limited partnerships as may hereafter join in this agreement at the

request of the trustees herein provided for.

2d. The following individuals, to wit:

W. C. Andrews, John D. Archbold, Lide K. Arter, J. A. Bostwick, Benjamin Brewster, D. Bushnell, Thomas C. Bushnell, J. N. Camden, Henry L. Davis, H. M. Flagler, Mrs. H. M. Flagler, John Huntington, H. A. Hutchins, Charles F. G. Heye, A. B. Jennings, Charles Lockhart, A. M. McGregor, William H. Macy, William H. Macy, Jr., estate of Josiah Macy, William H. Macy, Jr., executor; O. H. Payne, A. J. Pouch, John D. Rockefeller, William Rockefeller, Henry H. Rogers, W. P. Thompson, J. J. Vandergrift, William T. Wardell, W. G. Warden, Joseph L. Warden, Warden Frew & Company, Louise C. Wheaton, H. M. Hanna, and George W. Chapin, D. M. Harkness, D. M. Harkness, trustee, S. V. Harkness, O. H. Payne, trustee; Charles Pratt, Horace A. Pratt, C. M. Pratt, Julia H. York,

and the subject to which it related caused the interest in the certificates to be coincident with and the exact representative of the interest in the combination, that is, in the Standard Oil Company of Ohio. Soon afterwards it was alleged the trustees organized the Standard Oil Company of New Jersey and the Standard Oil Company of New York, the former having a capital stock of \$3,000,000 and the latter a capital stock of \$5,000,000, subsequently increased to \$10,000,000 and \$15,000,000, respectively. The bill alleged "that pursuant to said trust agreement the said trustees caused to be transferred to themselves the stocks of all corporations and limited partnerships named in said trust agreement, and caused various of the individuals and copartnerships who owned apparently independent refineries and other properties employed in the business of refining and transporting and selling oil in and among said various states and territories of the United States, as aforesaid, to transfer their property situated in said several

George H. Vilas, M. R. Keith, trustees, George F. Chester.

Also all such individuals as may hereafter join in the agreement at the request of the trustees herein provided for.

3d. A portion of the stockholders and members of the following corporations and limited partnerships, to-wit:

American Lubricating Oil Company.

Baltimore United Oil Company.

Beacon Oil Company.

Bush & Denslow Manufacturing Company.

Central Refining Company of Pittsburg.

Chesebrough Manufacturing Company.

Chess Carley Company.

Consolidated Tank Line Company.

Inland Oil Company.

Keystone Refining Company.

Maverick Oil Company.

National Transit Company.

Portland Kerosene Oil Company.

Producers' Consolidated Land & Petroleum Company.

Signal Oil Works (Limited).

Thompson & Bedford Company (Limited).

Devoe Manufacturing Company.

Eclipse Lubricating Oil Company (Limited).

Empire Refining Company (Limited).

Franklin Pipe Company (Limited).

Galena Oil Works (Limited).

Galena Farm Oil Company (Limited).

Germania Mining Company.

Vacuum Oil Company.

H. C. Van Tine & Company (Limited).

Waters-Pierce Oil Company.

Also stockholders and members (not being all thereof) of other corporations and limited partnerships who may hereafter join in this agreement at the request of the trustees herein provided for.

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states to the respective Standard Oil Companies of said states of New York, New Jersey, Pennsylvania, and Ohio, and other corporations organized or acquired by said trustees from time to time. . . . For the stocks and property so acquired the trustees issued trust certificates. It was alleged that in 1888 the trustees "unlawfully controlled the stock and ownership of various corporations and limited partnerships engaged in such purchase and transportation, refining, selling, and shipping of oil," as per a list which is excerpted in the margin.²⁷

27—List of corporations the stocks of which were wholly or partially held by the trustees of Standard Oil Trust.

	Capital Stock.	S. O. trust ownership.
New York state:		
Aeene Oil Company, manufacturers of petroleum products	\$ 300,000	Entire.
Atlas Refining Company, manufacturers of petroleum products.....	200,000	Do.
American Wick Manufacturing Company, manufacturers of lamp wicks.....	25,000	Do.
Bush & Denslow Manufacturing Company, manufacturers of petroleum products.	300,000	50 per cent.
Chesebrough Manufacturing Company, manufacturers of petroleum.....	500,000	2,661-5,000
Central Refining Company (Limited), manufacturers of petroleum products.	200,000	1 67.2 per cent.
Devoe Manufacturing Company, packers, manufacturers of petroleum.....	300,000	Entire.
Empire Refining Company (Limited), manufacturers of petroleum products.	100,000	80 per cent.
Oswego Manufacturing Company, manufacturers of wood cases.....	100,000	Entire.
Pratt Manufacturing Company, manufacturers of petroleum products.....	500,000	Do.
Standard Oil Company of New York, manufacturers of petroleum products.	5,000,000	Do.
Stone & Fleming Manufacturing Company (Limited), manufacturers of petroleum products	250,000	Do.
Thompson & Bedford Company (Limited), manufacturers of petroleum products.	250,000	80 per cent.
Vacuum Oil Company, manufacturers of petroleum products	25,000	75 per cent.

The bill charged that during the second period quo warranto proceedings were commenced against the Standard Oil Company of Ohio, which resulted in the entry by the supreme court of Ohio, on March 2, 1892, of a decree adjudging the trust agreement to be void, not only because the Standard Oil Company of Ohio was a party to the same, but also because the agreement in and of itself was in restraint of trade and amounted to the creation of an unlawful monopoly. It was alleged that shortly after this decision, seemingly for the purpose of complying therewith, voluntary proceedings

	Capital Stock.	S. O. trust ownership.
New Jersey:		
Eagle Oil Company, manufacturers of petroleum products	350,000	Entire.
McKiran Oil Company, jobbers of petroleum products	75,000	Do.
Standard Oil Company of New Jersey, manufacturers of petroleum products.	3,000,000	Do.
Pennsylvania:		
Aeme Oil Company, manufacturers of petroleum products	300,000	Do.
Atlantic Refining Company, manufacturers of petroleum products.....	400,000	Do.
Galena Oil Works (Limited), manufacturers of petroleum products.....	150,000	86¼ per cent.
Imperial Refining Company (Limited), manufacturers of petroleum products.	300,000	Entire.
Producers' Consolidated Land & Petroleum Company, producers of crude oil	1,000,000	65/122 per cent.
National Transit Company, transporters of crude oil.....	25,455,200	94 per cent.
Standard Oil Company, manufacturers of petroleum products.....	400,000	38¾ per cent.
Signal Oil Works (Limited), manufacturers of petroleum products.....	100,000	Entire.
Ohio:		
Consolidated Tank-Line Company, jobbers of petroleum products.....	1,000,000	57 per cent.
Inland Oil Company, jobbers of petroleum products	50,000	50 per cent.
Standard Oil Company, manufacturers of petroleum products	3,500,000	Entire
Solar Refining Company, manufacturers of petroleum products.....	500,000	Do.

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were had apparently to dissolve the trust, but that these proceedings were a subterfuge and a sham because they simply amounted to a transfer of the stock held by the trust in sixty-four of the companies which it controlled to some of the remaining twenty companies, it having controlled before the decree eighty-four in all, thereby, while seemingly in part giving up its dominion, yet in reality preserving the same by means of the control of the companies as to which it had retained complete authority. It was charged that especially was this the case, as the stock in the companies selected for transfer was virtually owned by the nine trustees or the members of their immediate families or associates. The bill further alleged that in 1897 the attorney general of Ohio instituted contempt proceedings in the quo warranto case, based

	Capital Stock.	S. O. trust ownership.
Kentucky:		
Standard Oil Company, jobbers of petroleum products	600,000	Do.
Maryland:		
Baltimore United Oil Company, manufacturers of petroleum products.....	600,000	5,059-6,000
West Virginia:		
Camden Consolidated Oil Company, manufacturers of petroleum products.....	200,000	51 per cent.
Minnesota:		
Standard Oil Company, jobbers of petroleum products	100,000	Entire.
Missouri:		
Waters-Pierce Oil Company, jobbers of petroleum products	400,000	50 per cent.
Massachusetts:		
Beacon Oil Company, jobbers of petroleum products	100,000	Entire.
Maverick Oil Company, jobbers of petroleum products	100,000	Do.
Maine:		
Portland Kerosene Oil Company, jobbers of petroleum products.....	200,000	Do.
Iowa:		
Standard Oil Company, jobbers of petroleum products	600,000	60 per cent.
Continental Oil Company, jobbers of petroleum products	300,000	62½ per cent.

upon the claim that the trust had not been dissolved as required by the decree in that case. About the same time, also, proceedings in quo warranto were commenced to forfeit the charter of a pipe line known as the Buckeye Pipe Line Company, an Ohio corporation, whose stock, it was alleged, was owned by the members of the combination, on the ground of its connection with the trust which had been held to be illegal.

The result of these proceedings, the bill charged, caused a resort to the alleged wrongful acts asserted to have been committed during the third period, as follows:

“That during the third period of said conspiracy, and in pursuance thereof, the said individual defendants operated through the Standard Oil Company of New Jersey, as a holding corporation, which corporation obtained and acquired the majority of the stocks of the various corporations engaged in purchasing, transporting, refining, shipping, and selling oil into and among the various states and territories of the United States and the District of Columbia and with foreign nations, and thereby managed and controlled the same, in violation of the laws of the United States, as hereinafter more particularly alleged.”

It was alleged that in or about the month of January, 1899, the individual defendants caused the charter of the Standard Oil Company of New Jersey to be amended, “so that the business and objects of said company were stated as follows, to wit: “To do all kinds of mining, manufacturing, and trading business; transporting goods and merchandise by land or water in any manner; to buy, sell, lease, and improve land; build houses, structures, vessels, cars, wharves, docks, and piers; to lay and operate pipe lines; to erect lines for conducting electricity; to enter into and carry out contracts of every kind pertaining to its business; to acquire, use, sell, and grant licenses under patent rights; to purchase or otherwise acquire, hold, sell, assign, and transfer shares of capital stock and bonds or other evidences of indebtedness of corporations, and to exercise all the privileges of ownership, including voting upon the stock so held; to carry on its business and have offices and agencies therefor in all parts of the world, and to hold, purchase, mortgage, and convey real estate

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and personal property outside of the state of New Jersey.' "

The capital stock of the company—which, since March 19, 1892, had been \$10,000,000—was increased to \$110,000,000; and the individual defendants, as theretofore, continued to be a majority of the board of directors.

Without going into detail it suffices to say that it was alleged in the bill that shortly after these proceedings the trust came to an end, the stock of the various corporations which had been controlled by it being transferred by its holders to the Standard Oil Company of New Jersey, which corporation issued therefor certificates of its common stock to the amount of \$97,250,000. The bill contained allegations referring to the development of new oil fields; for example, in California, southeastern Kansas, northern Indian Territory, and northern Oklahoma, and made reference to the building or otherwise acquiring by the combination of refineries and pipe lines in the new fields for the purpose of restraining and monopolizing the interstate trade in petroleum and its products.

Reiterating in substance the averments that both the Standard Oil Trust from 1882 to 1899, and the Standard Oil Company of New Jersey, since 1899, had monopolized and restrained interstate commerce in petroleum and its products, the bill at great length additionally set forth various means by which, during the second and third periods, in addition to the effect occasioned by the combination of alleged previously independent concerns, the monopoly and restraint complained of were continued. Without attempting to follow the elaborate averments on these subjects, spread over fifty-seven pages of the printed record, it suffices to say that such averments may properly be grouped under the following heads: Rebates, preferences, and other discriminatory practices in favor of the combination by railroad companies; restraint and monopolization by control of pipe lines, and unfair practices against competing pipe lines; contracts with competitors in restraint of trade; unfair methods of competition, such as local price cutting at the points where necessary to suppress competition; espionage of the business of competitors, the operation of bogus independent companies, and payment of rebates on oil, with the like intent; the division of the United

States into districts, and the limiting the operations of the various subsidiary corporations as to such districts so that competition in the sale of petroleum products between such corporations had been entirely eliminated and destroyed; and finally reference was made to what was alleged to be the "enormous and unreasonable profits" earned by the Standard Oil Trust and the Standard Oil Company as a result of the alleged monopoly; which presumably was averred as a means of reflexly inferring the scope and power acquired by the alleged combination.

Coming to the prayer of the bill, it suffices to say that in general terms the substantial relief asked was, first, that the combination in restraint of interstate trade and commerce, and which had monopolized the same, as alleged in the bill, be found to have existence, and that the parties thereto be perpetually enjoined from doing any further act to give effect to it; second, that the transfer of the stocks of the various corporations to the Standard Oil Company of New Jersey, as alleged in the bill, be held to be in violation of the 1st and 2d sections of the anti-trust act, and that the Standard Oil Company of New Jersey be enjoined and restrained from in any manner continuing to exert control over the subsidiary corporations by means of ownership of said stock or otherwise; third, that specific relief by injunction be awarded against further violation of the statute by any of the acts specifically complained of in the bill. There was also a prayer for general relief.

Of the numerous defendants named in the bill, the Waters-Pierce Oil Company was the only resident of the district in which the suit was commenced and the only defendant served with process therein. Contemporaneous with the filing of the bill the court made an order, under § 5 of the anti-trust act, for the service of process upon all the other defendants, wherever they could be found. Thereafter the various defendants unsuccessfully moved to vacate the order for service on non-resident defendants or filed pleas to the jurisdiction. Joint exceptions were likewise unsuccessfully filed, upon the ground of impertinence, to many of the averments of the bill of complaint, particularly those which related to acts alleged to have

been done by the combination prior to the passage of the anti-trust act, and prior to the year 1899.

Certain of the defendants filed separate answers, and a joint answer was filed on behalf of the Standard Oil Company of New Jersey and numerous of the other defendants. The scope of the answers will be adequately indicated by quoting a summary on the subject, made in the brief for the appellants.

"It is sufficient to say that, whilst admitting many of the alleged acquisitions of property, the formation of the so-called trust of 1882, its dissolution in 1892, and the acquisition by the Standard Oil Company of New Jersey of the stocks of the various corporations in 1899, they deny all the allegations respecting combinations or conspiracies to restrain or monopolize the oil trade; and particularly that the so-called trust of 1882, or the acquisition of the shares of the defendant companies by the Standard Oil Company of New Jersey in 1899, was a combination of *independent or competing* concerns or corporations. The averments of the petition respecting the means adopted to monopolize the oil trade are traversed either by a denial of the acts alleged, or of their purpose, intent, or effect."

On June 24, 1907, the cause being at issue, a special examiner was appointed to take the evidence, and his report was filed March 22, 1909. It was heard on April 5 to 10, 1909, under the expediting act of February 11, 1903 [32 Stat. at L. 823, chap. 544, U. S. Comp. Stat. Supp. 1909, p. 1211], before a circuit court consisting of four judges.

The court decided in favor of the United States. In the opinion delivered, all the multitude of acts of wrongdoing charged in the bill were put aside, in so far as they were alleged to have been committed prior to the passage of the anti-trust act, "except as evidence of their (the defendants') purpose, of their continuing conduct, and of its effect." (173 Fed. 177.)

By the decree which was entered it was adjudged that the combining of the stocks of various companies in the hands of the Standard Oil Company of New Jersey in 1899 constituted a combination in restraint of trade and also an attempt to monopolize and a monopolization under § 2 of the anti-trust act. The decree was against seven individual defendants, the Standard Oil Company of New Jersey, thirty-six domestic com-

panies, and one foreign company which the Standard Oil Company of New Jersey controls by stock ownership; these thirty-eight corporate defendants being held to be parties to the combination found to exist.²⁸

The bill was dismissed as to all other corporate defendants, thirty-three in number, it being adjudged by § 3 of the decree that they "have not been proved to be engaged in the operation of carrying out of the combination."²⁹

The Standard Oil Company of New Jersey was enjoined from voting the stocks or exerting any control over the said thirty-seven subsidiary companies, and the subsidiary companies were enjoined from paying any dividends as to the Standard Company, or permitting it to exercise any control over them by virtue of the stock ownership or power acquired by means of the combination. The individuals and corporations were also enjoined from entering into or carrying into effect any like combination which would evade the decree. Further, the individual defendants, the Standard Company, and the thirty-seven subsidiary corporations, were enjoined from engaging or continuing in interstate commerce in petroleum or its products during the continuance of the illegal combination.

At the outset a question of jurisdiction requires consideration, and we shall, also, as a preliminary, dispose of another question, to the end and that our attention may be completely concentrated upon the merits of the controversy when we come to consider them.

First. We are of opinion that in consequence of the presence within the district of the Waters-Pierce Oil Company, the

28—Counsel for appellants says: "Of the thirty-eight thirty-seven corporate defendants named in section 2 of the decree, and as to which the judgment of the court applies, four have not appealed; to wit: Corsicana Refining Company, Manhattan Oil Company, Security Oil Company, Waters-Pierce Oil Company, and one, the Standard Oil Company, of Iowa, has been liquidated and no longer exists."

29—Of the dismissed defendants,

sixteen were natural gas companies and ten were companies which were liquidated and ceased to exist before the filing of the petition. The other dismissed defendants, seven in number, were: Florence Oil Refining Company, United Oil Company, Tidewater Oil Company, Tide Water Pipe Company, (Limited), Platt & Washburn Refining Company, Franklin Pipe Company, and Pennsylvania Oil Company.

court, under the authority of § 5 of the anti-trust act, rightly took jurisdiction over the cause, and properly ordered notice to be served upon the nonresident defendants.

Second. The overruling of the exceptions taken to so much of the bill as counted upon facts occurring prior to the passage of the anti-trust act,—whatever may be the view as an original question of the duty to restrict the controversy to a much narrower area than that propounded by the bill,—we think by no possibility, in the present stage of the case, can the action of the court be treated as prejudicial error justifying reversal. We say this because the court, as we shall do, gave no weight to the testimony adduced under the averments complained of except in so far as it tended to throw light upon the acts done after the passage of the anti-trust act and the results of which it was charged were being participated in and enjoyed by the alleged combination at the time of the filing of the bill.

We are thus brought face to face with the merits of the controversy.

Both as to the law and as to the facts, the opposing contentions pressed in this argument are numerous, and in all their aspects are so irreconcilable, that it is difficult to reduce them to some fundamental generalization, which, by being disposed of, would decide them all. For instance, as to the law. While both sides agree that the determination of the controversy rests upon the correct construction and application of the 1st and 2d sections of the anti-trust act, yet the views as to the meaning of the act are as wide apart as the poles, since there is no real point of agreement on any view of the act. And this also is the case as to the scope and effect of authorities relied upon even although in some instances one and the same authority is asserted to be controlling.

So also is it as to the facts. Thus, on the one hand, with relentless pertinacity and minuteness of analysis, it is insisted that the facts establish that the assailed combination took its birth in a purpose to unlawfully acquire wealth by oppressing the public and destroying the just rights of others, and that its entire career exemplifies an inexorable carrying out of such wrongful intents, since, it is asserted,

the pathway of the combination from the beginning to the time of the filing of the bill is marked with constant proofs of wrong inflicted upon the public, and is strewn with the wrecks resulting from crushing out, without regard to law, the individual rights of others. Indeed, so conclusive, it is urged, is the proof on these subjects, that it is asserted that the existence of the principal corporate defendant, — the Standard Oil Company of New Jersey,—with the vast accumulation of property which it owns or controls, because of its infinite potency for harm and the dangerous example which its continued existence affords, is an open and enduring menace to all freedom of trade, and is a byword and reproach to modern economic methods. On the other hand, in a powerful analysis of the facts, it is insisted that they demonstrate that the origin and development of the vast business which the defendants control was but the result of lawful competitive methods, guided by economic genius of the highest order, sustained by courage, by a keen insight into commercial situations, resulting in the acquisition of great wealth, but at the same time serving to stimulate and increase production, to widely extend the distribution of the products of petroleum at a cost largely below that which would have otherwise prevailed, thus proving to be at one and the same time a benefaction to the general public as well as of enormous advantage to individuals. It is not denied that in the enormous volume of proof contained in the record in the period of almost a lifetime, to which that proof is addressed, there may be found acts of wrongdoing, but the insistence is that they were rather the exception than the rule, and in most cases were either the result of too great individual zeal in the keen rivalries of business, or of the methods and habits of dealing which, even if wrong, were commonly practised at the time. And to discover and state the truth concerning these contentions both arguments call for the analysis and weighing, as we have said at the outset, of a jungle of conflicting testimony covering a period of forty years,—a duty difficult to rightly perform, and, even if satisfactorily accomplished, almost impossible to state with any reasonable regard to brevity.

Duly appreciating the situation just stated, it is certain that only one point of concord between the parties is discernible,

which is, that the controversy in every aspect is controlled by a correct conception of the meaning of the 1st and 2d sections of the anti-trust act. We shall therefore—departing from what otherwise would be the natural order of analysis—make this one point of harmony the initial basis of our examination of the contentions, relying upon the conception that by doing so some harmonious resonance may result adequate to dominate and control the discord with which the case abounds. That is to say, we shall first come to consider the meaning of the 1st and 2d sections of the anti-trust act by the text, and after discerning what by that process appears to be its true meaning, we shall proceed to consider the respective contentions of the parties concerning the act, the strength or weakness of those contentions, as well as the accuracy of the meaning of the act as deduced from the text in the light of the prior decisions of this court concerning it. When we have done this, we shall then approach the facts. Following this course, we shall make our investigation under four separate headings: First. The text of the 1st and 2d sections of the act, originally considered, and its meaning in the light of the common law and the law of this country at the time of its adoption. Second. The contentions of the parties concerning the act, and the scope and effect of the decisions of this court upon which they rely. Third. The application of the statute to facts; and, Fourth. The remedy, if any, to be afforded as the result of such application.

First. The text of the act and its meaning.

We quote the text of the 1st and 2d sections of the act, as follows:

“Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

“Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person

or persons to monopolize, any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." [26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200.]

The debates show that doubt as to whether there was a common law of the United States which governed the subject in the absence of legislation was among the influences leading to the passage of the act. They conclusively show, however, that the main cause which led to the legislation was the thought that it was required by the economic condition of the times; that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally. Although debates may not be used as a means for interpreting a statute (*United States v. Trans-Missouri Freight Asso.* 166 U. S. 318, 41 L. ed. 1019, and cases cited), that rule, in the nature of things, is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law; that is, the history of the period when it was adopted.

There can be no doubt that the sole subject with which the 1st section deals is restraint of trade as therein contemplated, and that the attempt to monopolize and monopolization is the subject with which the 2d section is concerned. It is certain that those terms, at least in their rudimentary meaning, took their origin in the common law, and were also familiar in the law of this country prior to and at the time of the adoption of the act in question.

We shall endeavor, then first, to seek their meaning, not by indulging in an elaborate and learned analysis of the English law and of the law of this country, but by making a very brief reference to the elementary and indisputable conceptions

of both the English and American law on the subject prior to the passage of the anti-trust act.

a. It is certain that at a very remote period the words "contract in restraint of trade" in England came to refer to some voluntary restraint put by contract by an individual on his right to carry on his trade or calling. Originally all such contracts were considered to be illegal, because it was deemed they were injurious to the public as well as to the individuals who made them. In the interest of the freedom of individuals to contract, this doctrine was modified so that it was only when a restraint by contract was so general as to be coterminous with the kingdom that it was treated as void. That is to say, if the restraint was partial in its operation, and was otherwise reasonable, the contract was held to be valid:

b. Monopolies were defined by Lord Coke as follows:

" 'A monopoly is an institution or allowance by the King by his grant, commission, or otherwise, to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade.' (3 Inst. 181.) "

Hawkins thus defined them:

" 'A monopoly is an allowance by the King to a particular person or persons of the sole buying, selling, making, working, or using of anything whereby any person is sought to be restrained from any freedom [of manufacturing or trading] which he had before.' (Hawk. P. C. bk. 1, chap. 79.) "

The frequent granting of monopolies and the struggle which led to a denial of the power to create them, that is to say, to the establishment that they were incompatible with the English Constitution, is known to all and need not be reviewed. The evils which led to the public outcry against monopolies and to the final denial of the power to make them may be thus summarily stated: (1) The power which the monopoly gave to the one who enjoyed it, to fix the price and thereby injure the public; (2) The power which it engendered of enabling a limitation on production; and (3) The danger of deterioration in quality of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its

production and sale. As monopoly, as thus conceived, embraced only a consequence arising from an exertion of sovereign power, no express restrictions or prohibitions obtained against the creation by an individual of a monopoly as such. But as it was considered, at least, so far as the necessities of life were concerned, that individuals, by the abuse of their right to contract, might be able to usurp the power arbitrarily to enhance prices (one of the wrongs arising from monopoly), it came to be that laws were passed relating to offenses such as forestalling, regrating, and engrossing by which prohibitions were placed upon the power of individuals to deal under such circumstances and conditions as, according to the conception of the times, created a presumption that the dealings were not simply the honest exertion of one's right to contract for his own benefit, unaccompanied by a wrongful motive to injure others, but were the consequence of a contract or course of dealing of such a character as to give rise to the presumption of an intent to injure others through the means, for instance, of a monopolistic increase of prices. This is illustrated by the definition of engrossing found in the statute, 5 and 6 Edw. VI., chap. 14, as follows:

“Whatsoever person or persons . . . shall engross or get into his or their hands by buying, contracting, or promise-taking, other than by demise, grant, or lease of land, or tithe, any corn growing in the fields, or any other corn or grain, butter, cheese, fish, or other dead victuals whatsoever, within the realm of England, to the intent to sell the same again, shall be accepted, reputed, and taken an unlawful engrosser or engrossers.”

As by the statutes providing against engrossing the quantity engrossed was not required to be the whole or a proximate part of the whole of an article, it is clear that there was a wide difference between monopoly and engrossing, etc. But as the principal wrong which it was deemed would result from monopoly, that is, an enhancement of the price, was the same wrong to which it was thought the prohibited engrossment would give rise, it came to pass that monopoly and engrossing were regarded as virtually one and the same thing. In other words, the prohibited act of engrossing, because of its inevitable accomplishment of one of the evils deemed to be

engendered by monopoly, came to be referred to as being a monopoly or constituting an attempt to monopolize. Thus POLLEXFEN, in his argument in *East India Co. v. Sandys*, Skinner, 165, 169, said:

"By common law, he said that trade is free, and for that cited 3 Co. Inst. 181; F. B. 65; *Taylor de Ipswich v. Sherring*, 1 Rolle, Rep. 4; that the common law is as much against monopoly as engrossing; and that they differ only that a monopoly is by patent from the King, the other is by the act of the subject between party and party; but that the mischiefs are the same from both, and there is the same law against both. *Darcy v. Allen*, F. Moore, 673, 11 Coke, 84. The sole trade of anything is engrossing *ex rei natura*, for whosoever hath the sale trade of buying and selling hath engrossed that trade; and whosoever hath the sole trade to any country hath the sole trade of buying and selling the produce of that country, at his own price, which is an engrossing."

And by operation of the mental process which led to considering as a monopoly acts which, although they did not constitute a monopoly, were thought to produce some of its baneful effects, so also because of the impediment or burden to the due course of trade which they produced, such acts came to be referred to as in restraint of trade. This is shown by my Lord COKE's definition of monopoly as being "an institution or allowance . . . whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade." It is illustrated also by the definition which HAWKINS gives of monopoly wherein it is said that the effect of monopoly is to restrain the citizen "from the freedom of manufacturing or trading which he had before." And see especially the opinion of PARKER, C. J., in *Mitchel v. Reynolds* (1711) 1 P. Ws. 181, where a classification is made of monopoly which brings it generically within the description of restraint of trade.

Generalizing these considerations, the situation is this: 1. That by the common law, monopolies were unlawful because of their restriction upon individual freedom of contract and their injury to the public. 2. That as to necessities of life, the freedom of the individual to deal was restricted where the

nature and character of the dealing was such as to engender the presumption of intent to bring about at least one of the injuries which it was deemed would result from monopoly,—that is, an undue enhancement of price. 3. That to protect the freedom of contract of the individual, not only in his own interest, but principally in the interest of the common weal, a contract of an individual by which he put an unreasonable restraint upon himself as to carrying on his trade or business was void. And that at common law the evils consequent upon engrossing, etc., caused those things to be treated as coming within monopoly and sometimes to be called monopoly, and the same considerations caused monopoly, because of its operation and effect, to be brought within and spoken of generally as impeding the due course of, or being in restraint of, trade.

From the development of more accurate economic conceptions and the changes in conditions of society, it came to be recognized that the acts prohibited by the engrossing, forestalling, etc., statutes did not have the harmful tendency which they were presumed to have when the legislation concerning them was enacted, and therefore did not justify the presumption which had previously been deduced from them, but, on the contrary, such acts tended to fructify and develop trade. See the statutes of 12th George III., chap. 71, enacted in 1772, and statute of 7 and 8 Victoria, chap. 24, enacted in 1844, repealing the prohibitions against engrossing, forestalling, etc., upon the express ground that the prohibited acts had come to be considered as favorable to the development of, and not in restraint of, trade. It is remarkable that nowhere at common law can there be found a prohibition against the creation of monopoly by an individual. This would seem to manifest, either consciously or intuitively, a profound conception as to the inevitable operation of economic forces and the equipoise or balance in favor of the protection of the rights of individuals which resulted. That is to say, as it was deemed that monopoly in the concrete could only arise from an act of sovereign power, and, such sovereign power being restrained, prohibitions as to individuals were directed not against the creation of monopoly, but were only applied to such acts in relation to particular subjects as to which it was deemed, if not restrained, some of the consequences of monop-

oly might result. After all, this was but an instinctive recognition of the truisms that the course of trade could not be made free by obstructing it, and that an individual's right to trade could not be protected by destroying such right.

From the review just made it clearly results that outside of the restrictions resulting from the want of power in an individual to voluntarily and unreasonably restrain his right to carry on his trade or business, and outside of the want of right to restrain the free course of trade by contracts or acts which implied a wrongful purpose, freedom to contract and to abstain from contracting, and to exercise every reasonable right incident thereto, became the rule in the English law. The scope and effect of this freedom to trade and contract is clearly shown by the decision in *Mogul S. S. Co. v. McGregor* [1891] A. C. 25, 61 L. J. Q. B. N. S. 295, 66 L. T. N. S. 1, 40 Week. Rep. 337, 7 Asp. Mar. L. Cas. 120, 56 J. P. 101. While it is true that the decision of the House of Lords in the case in question was announced shortly after the passage of the anti-trust act, it serves reflexly to show the exact state of the law in England at the time the anti-trust statute was enacted.

In this country also the acts from which it was deemed there resulted a part, if not all, of the injurious consequences ascribed to monopoly, came to be referred to as a monopoly itself. In other words, here as had been the case in England, practical common sense caused attention to be concentrated not upon the theoretically correct name to be given to the condition or acts which gave rise to a harmful result, but to the result itself and to the remedying of the evils which it produced. The statement just made is illustrated by an early statute of the province of Massachusetts, that is, chap. 31 of the Laws of 1778-1779, by which monopoly and forestalling were expressly treated as one and the same thing.

It is also true that while the principles concerning contracts in restraint of trade, that is, voluntary restraint put by a person on his right to pursue his calling, hence only operating subjectively, came generally to be recognized in accordance with the English rule, it came moreover to pass that contracts or acts which it was considered had a monopolistic tendency, especially those which were thought to unduly diminish competition and hence to enhance prices—in other words, to

monopolize—came also in a generic sense to be spoken of and treated as they had been in England, as restricting the due course of trade, and therefore as being in restraint of trade. The dread of monopoly as an emanation of governmental power, while it passed at an early date out of mind in this country, as a result of the structure of our government, did not serve to assuage the fear as to the evil consequences which might arise from the acts of individuals producing or tending to produce the consequences of monopoly. It resulted that treating such acts as we have said as amounting to monopoly, sometimes constitutional restrictions, again legislative enactments or judicial decisions, served to enforce and illustrate the purpose to prevent the occurrence of the evils recognized in the mother country as consequent upon monopoly, by providing against contracts or acts of individuals or combinations of individuals or corporations deemed to be conducive to such results. To refer to the constitutional or legislative provisions on the subject, or the many judicial decisions which illustrate it, would unnecessarily prolong this opinion. We append in the margin a note to treaties, etc., wherein are contained references to constitutional and statutory provisions and to numerous decisions, etc., relating to the subject.³⁰

It will be found that, as modern conditions arose, the trend of legislation and judicial decision came more and more to adapt the recognized restrictions to new manifestations of conduct or of dealing which it was thought justified the inference of intent to do the wrong which it had been the purpose to prevent from the beginning. The evolution is clearly pointed out in *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 49 L. ed. 689, and *Shawnee Compress Co. v. Anderson*, 209 U. S. 423, 52 L. ed. 865; and, indeed, will be found to be illustrated in various aspects by the decisions of this court which have been concerned with the enforcement of the act we are now considering.

Without going into detail, and but very briefly surveying the whole field, it may be with accuracy said that the dread of

30—Purdy's Beach, Priv. Corp. 194, 195; 20 Am. & Eng. Enc. Law, pp. 1403 et seq., chapter on Trusts and Monopolies; Cooke, Trade & Trusts," pp. 844 et seq. (cited by the court).

enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act, or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but, on the contrary, were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy. It is equally true to say that the survey of the legislation in this country on this subject from the beginning will show, depending, as it did, upon the economic conceptions which obtained at the time when the legislation was adopted or judicial decision was rendered, that contracts or acts were at one time deemed to be of such a character as to justify the inference of wrongful intent which were at another period thought not to be of that character. But this again, as we have seen, simply followed the line of development of the law of England.

Let us consider the language of the 1st and 2d sections, guided by the principle that where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary.³¹

As to the 1st section, the words to be interpreted are: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce . . . is hereby declared to be illegal." As there is no room for

31—*Swearingen v. United States*, 161 U. S. 446, 40 L. ed. 765; *United States v. Wong Kim Ark*, 169 U. S. 649, 42 L. ed. 890; *Keck v. United*

States, 172 U. S. 446, 43 L. ed. 510; *Kepner v. United States*, 195 U. S. 126, 49 L. ed. 123, 1 A. & E. Ann. Cas. 655 (cited by the court).

dispute that the statute was intended to formulate a rule for the regulation of interstate and foreign commerce, the question is, What was the rule which it adopted?

In view of the common law and the law in this country as to restraint of trade, which we have reviewed, and the illuminating effect which that history must have under the rule to which we have referred, we think it results:

a. That the context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade, because it groups as within that class, not only contracts which were in restraint of trade in the subjective sense, but all contracts or acts which theoretically were attempts to monopolize, yet which in practice had come to be considered as in restraint of trade in a broad sense.

b. That in view of the many new forms of contracts and combinations which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation. The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combinations or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference,—that is, an undue restraint.

c. And as the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce or the subjects of such commerce, and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibition contained in the statute had or had not in any given case been violated. Thus not specifying, but indubitably con-

templating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided.

And a consideration of the text of the 2d section serves to establish that it was intended to supplement the 1st, and to make sure that by no possible guise could the public policy embodied in the 1st section be frustrated or evaded. The prohibition of the 2d embraces "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states or with foreign nations . . ." By reference to the terms of § 8 it is certain that the word "person" clearly implies a corporation as well as an individual.

The commerce referred to by the words "in part," construed in the light of the manifest purpose of the statute, has both a geographical and a distributive significance; that is, it includes any portion of the United States and any one of the classes of things forming a part of interstate or foreign commerce.

Undoubtedly, the words "to monopolize" and "monopolize," as used in the section, reach every act bringing about the prohibited results. The ambiguity, if any, is involved in determining what is intended by monopolize. But this ambiguity is readily dispelled in the light of the previous history of the law of restraint of trade to which we have referred and the indication which it gives of the practical evolution by which monopoly and the acts which produce the same result as monopoly, that is, an undue restraint of the course of trade, all came to be spoken of as, and to be indeed synonymous with, restraint of trade. In other words, having by the 1st section forbidden all means of monopolizing trade, that is, unduly restraining it by means of every contract, combination, etc., the 2d section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the 1st section, that

is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the 1st section. And, of course, when the 2d section is thus harmonized with and made, as it was intended to be, the complement of the 1st, it becomes obvious that the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed is the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act, and thus the public policy which its restrictions were obviously enacted to subserve. And it is worthy of observation, as we have previously remarked concerning the common law, that although the statute, by the comprehensiveness of the enumerations embodied in both the 1st and 2d sections, makes it certain that its purpose was to prevent undue restraints of every kind or nature, nevertheless by the omission of any direct prohibition against monopoly in the concrete, it indicates a consciousness that the freedom of the individual right to contract, when not unduly or improperly exercised, was the most efficient means for the prevention of monopoly, since the operation of the centrifugal and centripetal forces resulting from the right to freely contract was the means by which monopoly would be inevitably prevented if no extraneous or sovereign power imposed it and no right to make unlawful contracts having a monopolistic tendency were permitted. In other words, that freedom to contract was the essence of freedom from undue restraint on the right to contract.

Clear as it seems to us is the meaning of the provisions of the statute in the light of the review which we have made, nevertheless, before definitively applying that meaning, it behooves us to consider the contentions urged on one side or the other concerning the meaning of the statute, which, if maintained, would give to it, in some aspects, a much wider and in every view, at least, a somewhat different, significance. And to do this brings us to the second question, which, at the outset, we have stated it was our purpose to consider and dispose of.

Second. The contentions of the parties as to the meaning

of the statute, and the decisions of this court relied upon concerning those contentions.

In substance, the propositions urged by the government are reducible to this: That the language of the statute embraces every contract, combination, etc., in restraint of trade, and hence its text leaves no room for the exercise of judgment, but simply imposes the plain duty of applying its prohibitions to every case within its literal language. The error involved lies in assuming the matter to be decided. This is true, because, as the acts which may come under the classes stated in the 1st section and the restraint of trade to which that section applies are not specifically enumerated or defined, it is obvious that judgment must in every case be called into play in order to determine whether a particular act is embraced within the statutory classes, and whether, if the act is within such classes, its nature or effect causes it to be a restraint of trade within the intendment of the act. To hold to the contrary would require the conclusion either that every contract, act, or combination of any kind or nature, whether it operated a restraint on trade or not, was within the statute, and thus the statute would be destructive of all right to contract or agree or combine in any respect whatever as to subjects embraced in interstate trade or commerce, or, if this conclusion were not reached, then the contention would require it to be held that, as the statute did not define the things to which it related, and excluded resort to the only means by which the acts to which it relates could be ascertained,—the light of reason,—the enforcement of the statute was impossible because of its uncertainty. The merely generic enumeration which the statute makes of the acts to which it refers, and the absence of any definition of restraint of trade as used in the statute, leaves room for but one conclusion, which is, that it was expressly designed not to unduly limit the application of the act by precise definition, but, while clearly fixing a standard, that is, by defining the ulterior boundaries which could not be transgressed with impunity, to leave it to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case whether any particular act or contract was within the contemplation of the statute.

But, it is said, persuasive as these views may be, they may not be here applied, because the previous decisions of this court have given to the statute a meaning which expressly excludes the construction which must result from the reasoning stated. The cases are *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, and *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259. Both the cases involved the legality of combinations or associations of railroads engaged in interstate commerce for the purpose of controlling the conduct of the parties to the association or combination in many particulars. The association or combination was assailed in each case as being in violation of the statute. It was held that they were. It is undoubted that, in the opinion in each case, general language was made use of, which, when separated from its context, would justify the conclusion that it was decided that reason could not be resorted to for the purpose of determining whether the acts complained of were within the statute. It is, however, also true that the nature and character of the contract or agreement in each case was fully referred to, and suggestions as to their unreasonableness pointed out in order to indicate that they were within the prohibitions of the statute. As the cases cannot, by any possible conception, be treated as authoritative without the certitude that reason was resorted to for the purpose of deciding them, it follows as a matter of course that it must have been held by the light of reason, since the conclusion could not have been otherwise reached, that the assailed contracts or agreements were within the general enumeration of the statute, and that their operation and effect brought about the restraint of trade which the statute prohibited. This being inevitable, the deduction can in reason only be this: That in the cases relied upon, it having been found that the acts complained of were within the statute, and operated to produce the injuries which the statute forbade, that resort to reason was not permissible in order to allow that to be done which the statute prohibited. This being true, the rulings in the case relied upon, when rightly appreciated, were therefore this, and nothing more: That as considering the contracts and agreements, their necessary effect, and the character of the parties by whom they were made, they were clearly re-

straints of trade within the purview of the statute, they could not be taken out of that category by indulging in general reasoning as to the expediency or nonexpediency of having made the contracts, or the wisdom or want of wisdom of the statute which prohibited their being made. That is to say, the cases but decided that the nature and character of the contracts, creating, as they did, a conclusive presumption which brought them within the statute, such result was not to be disregarded by the substitution of a judicial appreciation of what the law ought to be for the plain judicial duty of enforcing the law as it was made.

But aside from reasoning, it is true to say that the cases relied upon do not, when rightly construed, sustain the doctrine contended for, is established by all of the numerous decisions of this court which have applied and enforced the anti-trust act, since they all, in the very nature of things, rest upon the premise that reason was the guide by which the provisions of the act were in every case interpreted. Indeed, intermediate the decision of the two cases, that is, after the decision in the Freight Association Case, and before the decision in the Joint Traffic Case, the case of *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, was decided, the opinion being delivered by Mr. Justice PECKHAM, who wrote both the opinions in the Freight Association and in the Joint Traffic Cases. And, referring in the Hopkins Case to the broad claim made as to the rule of interpretation announced in the Freight Association Case, it was said (p. 592): "To treat as condemned by the act all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. There must be some direct and immediate effect upon interstate commerce in order to come within the act." And in the Joint Traffic Case this statement was expressly reiterated and approved and illustrated by example. Like limitation on the general language used in Freight Association and Joint Traffic Cases is also the clear result of *E. Bement & Sons v. National Harrow Co.* 186 U. S. 70, 92, 46 L. ed. 1058, 1069, and especially of *Cincinnati, P. B. S. & P. Packet Co. v. Bay*, 200 U. S. 179, 50 L. ed. 428.

If the criterion by which it is to be determined in all cases whether every contract, combination, etc., is a restraint of trade within the intendment of the law, is the direct or indirect effect of the acts involved, then of course the rule of reason becomes the guide, and the construction which we have given the statute, instead of being refuted by the cases relied upon, is by those cases demonstrated to be correct. This is true, because the construction which we have deduced from the history of the act and the analysis of its text is simply that in every case where it is claimed that an act or acts are in violation of the statute, the rule of reason, in the light of the principles of law and the public policy which the act embodies, must be applied. From this it follows, since that rule and the result of the test as to direct or indirect, in their ultimate aspect, come to one and the same thing, that the difference between the two is therefore only that which obtains between things which do not differ at all.

If it be true that there is this identity of result between the rule intended to be applied in the Freight Association Case, that is, the rule of direct and indirect, and the rule of reason which, under the statute as we construe it, should be here applied, it may be asked how was it that, in the opinion in the Freight Association Case, much consideration was given to the subject of whether the agreement or combination which was involved in that case could be taken out of the prohibitions of the statute upon the theory of its reasonableness. The question is pertinent and must be fully and frankly met; for if it be now deemed that the Freight Association Case was mistakenly decided or too broadly stated, the doctrine which it announced should be either expressly overruled or limited.

The confusion which gives rise to the question results from failing to distinguish between the want of power to take a case which, by its terms or the circumstances which surrounded it, considering among such circumstances the character of the parties, is plainly within the statute, out of the operation of the statute by resort to reason in effect to establish that the contract ought not to be treated as within the statute, and the duty in every case where it becomes necessary from the nature and character of the parties to decide whether it was within the statute, to pass upon that question by the light of reason.

This distinction, we think, serves to point out what, in its ultimate conception, was the thought underlying the reference to the rule of reason made in the Freight Association Case,—especially when such reference is interpreted by the context of the opinion and in the light of the subsequent opinion in the Hopkins Case and in Cincinnati, P. B. S. & P. Packet Co. v. Bay.

And in order not in the slightest degree to be wanting in frankness, we say that in so far, however, as by separating the general language used in the opinions in the Freight Association and Joint Traffic Cases from the context and the subject and parties with which the cases were concerned, it may be conceived that the language referred to conflicts with the construction which we give the statute, they are necessarily now limited and qualified. We see no possible escape from this conclusion if we are to adhere to the many cases decided in this court in which the anti-trust law has been applied and enforced, and if the duty to apply and enforce that law in the future is to continue to exist. The first is true, because the construction which we now give the statute does not in the slightest degree conflict with a single previous case decided concerning the anti-trust law, aside from the contention as to the Freight Association and Joint Traffic Cases, and because every one of those cases applied the rule of reason for the purpose of determining whether the subject before the court was within the statute. The second is also true, since, as we have already pointed out, unaided by the light of reason it is impossible to understand how the statute may in the future be enforced and the public policy which it establishes be made efficacious.

So far as the objections of the appellants are concerned, they are all embraced under two headings:—

a. That the act, even if the averments of the bill be true, cannot be constitutionally applied, because to do so would extend the power of Congress to subjects *dehors* the reach of its authority to regulate commerce, by enabling that body to deal with mere questions of production of commodities within the states. But all the structure upon which this argument proceeds is based upon the decision in *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325. The view, how-

ever, which the argument takes of that case, and the arguments based upon that view, have been so repeatedly pressed upon this court in connection with the interpretation and enforcement of the anti-trust act, and have been so necessarily and expressly decided to be unsound, as to cause the contentions to be plainly foreclosed and to require no express notice. *Northern Securities Co. v. United States*, 193 U. S. 334, 48 L. ed. 699; *Loewe v. Lawler*, 208 U. S. 274, 52 L. ed. 488, 13 A. & E. Ann. Cas. 815; *Swift & Co. v. United States*, 196 U. S. 375, 49 L. ed. 518; *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. ed. 608; *Shawnee Compress Co. v. Anderson*, 209 U. S. 423.

[Then follows the passage quoted, *supra*, p. 780. The opinion continues, as follows:]

We come, then, to the third proposition requiring consideration, *viz.*:

Third. The facts and the application of the statute to them.

Beyond dispute the proofs establish substantially as alleged in the bill the following facts:

1. The creation of the Standard Oil Company of Ohio.
2. The organization of the Standard Oil Trust of 1882, and also a previous one of 1879, not referred to in the bill, and the proceedings in the supreme court of Ohio, culminating in a decree based upon the finding that the company was unlawfully a party to that trust; the transfer by the trustees of stocks in certain of the companies; the contempt proceedings; and, finally, the increase of the capital of the Standard Oil Company of New Jersey and the acquisition by that company of the shares of the stock of the other corporations in exchange for its certificates.

The vast amount of property and the possibilities of far-reaching control which resulted from the facts last stated are shown by the statement which we have previously annexed concerning the parties to the trust agreement of 1882, and the corporations whose stock was held by the trustees under the trust, and which came therefore to be held by the New Jersey corporation. But these statements do not with accuracy convey an appreciation of the situation as it existed at the time of the entry of the decree below, since, during the more than ten years which elapsed between the acquiring by the New

Jersey corporation of the stock and other property which was formerly held by the trustees under the trust agreement, the situation, of course, had somewhat changed,—a change which, when analyzed in the light of the proof, we think establishes that the result of enlarging the capital stock of the New Jersey company and giving it the vast power to which we have referred produced its normal consequence; that is, it gave to the corporation, despite enormous dividends and despite the dropping out of certain corporations enumerated in the decree of the court below, an enlarged and more perfect sway and control over the trade and commerce in petroleum and its products. The ultimate situation referred to will be made manifest by an examination of §§ 2 and 4 of the decree below, which are excerpted in the margin.³²

Giving to the facts just stated the weight which it was deemed they were entitled to, in the light afforded by the proof

32—Section 2. That the defendants John D. Rockefeller, William Rockefeller, Henry H. Rogers, Henry M. Flagler, John D. Archbold, Oliver H. Payne, and Charles M. Pratt, hereafter called the seven individual defendants, united with the Standard Oil Company and other defendants to form and effectuate this combination, and since its formation have been and still are engaged in carrying it into effect and continuing it; that the defendants Anglo-American Oil Company (Limited), Atlantic Refining Company, Buckeye Pipe Line Company, Borne-Seymsier Company, Chesebrough Manufacturing Company, Consolidated, Cumberland Pipe Line Company, Colonial Oil Company, Continental Oil Company, Creseent Pipe Line Company, Henry C. Folger, Jr., and Calvin N. Payne, a copartnership doing business under the firm name and style of Corsicana Refining Company, Eureka Pipe Line Company, Galena Signal Oil Company, Indiana Pipe Line Company, Manhattan Oil Company, National Transit Company, New York Transit Company, Northern Pipe Line Company, Ohio Oil Company, Prairie Oil & Gas Company, Security Oil Company, Solar Refining Company, Southern Pipe Line Company, South Penn Oil Company, Southwest Pennsylvania Pipe Lines Company, Standard Oil Company of California, Standard Oil Company of Indiana, Standard Oil Company of Iowa, Standard Oil Company of Kansas, Standard Oil Company of Kentucky, Standard Oil Company of Nebraska, Standard Oil Company of New York, Standard Oil Company of Ohio, Swan & Finch Company, Union Tank Line Company, Vacuum Oil Company, Washington Oil Company, Waters-Pierce Oil Company,—have entered into and become parties to this combination, and are either actively operating or aiding in the operation of it; that by means of this combination the defendants named in this section have combined and conspired to monopolize, have monopolized, and are continuing to

of other cognate facts and circumstances, the court below held that the acts and dealings established by the proof operated to destroy the "potentiality of competition" which otherwise would have existed to such an extent as to cause the transfers of stock which were made to the New Jersey Corporation and the control which resulted over the many and various subsidiary corporations to be a combination or conspiracy in restraint of trade, in violation of the 1st section of the act, but also to be an attempt to monopolize and monopolization bringing about a perennial violation of the 2d section.

We see no cause to doubt the correctness of these conclusions, considering the subject from every aspect; that is, both in view of the facts established by the record and the necessary operation and effect of the law as we have construed it upon the inferences deducible from the facts, for the following reasons:

monopolize, a substantial part of the commerce among the states, in the territories, and with foreign nations, in violation of § 2 of the anti-trust act.

Section 4. That in the formation and execution of the combination or conspiracy the Standard Company has issued its stock to the amount of more than \$90,000,000 in exchange for the stocks of other corporations which it holds, and it now owns and controls all of the capital stock of many corporations, a majority of the stock or controlling interests in some corporations, and stock in other corporations as follows:

Name of company.	Total capital stock.	Owned by Standard Oil Company.
Anglo-American Oil Company, Limited.....	£1,000,000	£999,740
Atlantic Refining Company.....	\$5,000,000	\$5,000,000
Borne-Scrymser Company.....	200,000	199,700
Buckeye Pipe Line Company.....	10,000,000	9,999,700
Chesobrough Manufacturing Company, Consolidated	500,000	277,300
Colonial Oil Company	250,000	249,300
Continental Oil Company.....	300,000	300,000
Crescent Pipe Line Company.....	3,000,000	3,000,000
Eureka Pipe Line Company.....	5,000,000	4,999,400
Galena-Signal Oil Company.....	10,000,000	7,079,500
Indiana Pipe Line Company.....	1,000,000	999,700
Lawrence Natural Gas Company.....	450,000	450,000
Mahoning Gas Fuel Company.....	150,000	149,900

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n. Because the unification of power and control over petroleum and its products which was the inevitable result of the combining in the New Jersey corporation by the increase of its stock and the transfer to it of the stocks of so many other corporations, aggregating so vast a capital, gives rise, in and of itself, in the absence of countervailing circumstances, to say the least, to the *prima facie* presumption of intent and purpose to maintain the dominancy over the oil industry, not as a result of normal methods of industrial development, but by new means of combination which were resorted to in order that greater power might be added than would otherwise have arisen had normal methods been followed, the whole with the purpose of excluding others from the trade, and thus centralizing in the combination a perpetual control of the movements of petroleum and its products in the channels of interstate commerce.

Name of company.	Total capital stock.	Owned by Standard Oil Company.
Mountain State Gas Company.....	500,000	500,000
National Transit Company.....	25,455,200	25,451,650
New York Transit Company.....	5,000,000	5,000,000
Northern Pipe Line Company.....	4,000,000	4,000,000
Northwestern Ohio Natural Gas Company.....	2,775,250	1,649,450
Ohio Oil Company.....	10,000,000	9,999,850
People's Natural Gas Company.....	1,000,000	1,000,000
Pittsburg Natural Gas Company.....	310,000	310,000
Solar Refining Company.....	500,000	499,400
Southern Pipe Line Company.....	10,000,000	10,000,000
South Penn Oil Company.....	2,500,000	2,500,000
Southwest Pennsylvania Pipe Lines.....	3,500,000	3,500,000
Standard Oil Company (of California).....	17,000,000	16,999,500
Standard Oil Company (of Indiana).....	1,000,000	999,000
Standard Oil Company (of Iowa).....	1,000,000	1,000,000
Standard Oil Company (of Kansas).....	1,000,000	999,300
Standard Oil Company (of Kentucky).....	1,000,000	997,200
Standard Oil Company (of Nebraska).....	600,000	599,500
Standard Oil Company (of New York).....	15,000,000	15,000,000
Standard Oil Company (of Ohio).....	3,500,000	3,499,400
Swan & Finch Company.....	100,000	100,000
Union Tank Line Company.....	3,500,000	3,499,400
Vacuum Oil Company.....	2,500,000	2,500,000
Washington Oil Company.....	100,000	71,480
Waters-Pierce Oil Company.....	400,000	274,700

b. Because the prima facie presumption of intent to restrain trade, to monopolize and to bring about monopolization, resulting from the act of expanding the stock of the New Jersey corporation and vesting it with such vast control of the oil industry, is made conclusive by considering (1) the conduct of the persons or corporations who were mainly instrumental in bringing about the extension of power in the New Jersey

That the defendant National Transit Company, which is owned and controlled by the Standard Oil Company as aforesaid, owns and controls the amounts of the capital stocks of the following-named corporations and limited partnerships stated opposite each, respectively, as follows:

Name of company.	Total capital stock.	Owned by National Transit Company.
Connecting Gas Company.....	\$ 825,000	\$ 412,000
Cumberland Pipe Line Company.....	1,000,000	998,500
East Ohio Gas Company.....	6,000,000	5,999,500
Franklin Pipe Company, Limited.....	50,000	19,500
Prairie Oil & Gas Company.....	10,000,000	9,999,500

That the Standard Company has also acquired the control by the ownership of its stock or otherwise of the Security Oil Company, a corporation created under the laws of Texas, which owns a refinery at Beaumont in that state, and the Manhattan Oil Company, a corporation, which owns a pipe line situated in the states of Indiana and Ohio; that the Standard Company and the corporations and partnerships named in § 2 are engaged in the various branches of the business of producing, purchasing, and transporting petroleum in the principal oil-producing districts of the United States, in New York, Pennsylvania, West Virginia, Tennessee, Kentucky, Ohio, Indiana, Illinois, Kansas, Oklahoma, Louisiana, Texas, Colorado, and California, in shipping and transporting the oil through pipe lines owned or controlled by these companies from the various oil-producing districts into and through other states, in refining the petroleum and manufacturing it into various products, in shipping the petroleum and the products thereof into the states and territories of the United States, the District of Columbia, and to foreign nations, in shipping the petroleum and its products in tank cars owned or controlled by the subsidiary companies into various states and territories of the United States and into the District of Columbia, and in selling the petroleum and its products in various places in the states and territories of the United States, in the District of Columbia, and in foreign countries; that the Standard Company controls the subsidiary companies and directs the management thereof, so that none of the subsidiary companies competes with any other of those companies or with the Standard Company, but their trade is all managed as that of a single person.

corporation before the consummation of that result and prior to the formation of the trust agreements of 1879 and 1882; (2) by considering the proof as to what was done under those agreements and the acts which immediately preceded the vesting of power in the New Jersey corporation, as well as by weighing the modes in which the power vested in that corporation has been exerted and the results which have arisen from it.

Recurring to the acts done by the individuals or corporations who were mainly instrumental in bringing about the expansion of the New Jersey corporation during the period prior to the formation of the trust agreements of 1879 and 1882, including those agreements, not for the purpose of weighing the substantial merit of the numerous charges of wrongdoing made during such period, but solely as an aid for discovering intent and purpose, we think no disinterested mind can survey the period in question without being irresistibly driven to the conclusion that the very genius for commercial development and organization which it would seem was manifested from the beginning soon begot an intent and purpose to exclude others which was frequently manifested by acts and dealings wholly inconsistent with the theory that they were made with the single conception of advancing the development of business power by usual methods, but which, on the contrary, necessarily involved the intent to drive others from the field and to exclude them from their right to trade, and thus accomplish the mastery which was the end in view. And, considering the period from the date of the trust agreements of 1879 and 1882, up to the time of the expansion of the New Jersey corporation, the gradual extension of the power over the commerce in oil which ensued, the decision of the supreme court of Ohio, the tardiness or reluctance in conforming to the commands of that decision, the methods first adopted and that which finally culminated in the plan of the New Jersey corporation, all additionally serve to make manifest the continued existence of the intent which we have previously indicated, and which, among other things, impelled the expansion of the New Jersey corporation. The exercise of the power which resulted from that organization fortifies the foregoing conclusions, since the development which came, the acquisition here and there which ensued of every efficient means

by which competition could have been asserted, the slow but resistless methods which followed by which means of transportation were absorbed and brought under control, the system of marketing which was adopted by which the country was divided into districts and the trade in each district in oil was turned over to a designated corporation within the combination, and all others were excluded, all lead the mind up to a conviction of a purpose and intent which we think is so certain as practically to cause the subject not to be within the domain of reasonable contention.

The inference that no attempt to monopolize could have been intended, and that no monopolization resulted from the acts complained of, since it is established that a very small percentage of the crude oil produced was controlled by the combination, is unwarranted. As substantial power over the crude product was the inevitable result of the absolute control which existed over the refined product, the monopolization of the one carried with it the power to control the other; and if the inferences which this situation suggests were developed, which we deem it unnecessary to do, they might well serve to add additional cogency to the presumption of intent to monopolize which we have found arises from the unquestioned proof on other subjects.

We are thus brought to the last subject which we are called upon to consider, *viz.*:

Fourth. The remedy to be administered.

It may be conceded that ordinarily where it was found that acts had been done in violation of the statute, adequate measure of relief would result from restraining the doing of such acts in the future. *Swift & Co. v. United States*, 196 U. S. 375, 49 L. ed. 518. But in a case like this, where the condition which has been brought about in violation of the statute, in and of itself is not only a continued attempt to monopolize, but also a monopolization, the duty to enforce the statute requires the application of broader and more controlling remedies. As penalties which are not authorized by law may not be inflicted by judicial authority, it follows that to meet the situation with which we are confronted the application of remedies two-fold in character becomes essential: 1st. To forbid the doing in the future of acts like those which we have

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found to have been done in the past which would be violative of the statute. 2d. The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about.

In applying remedies for this purpose, however, the fact must not be overlooked that injury to the public by the prevention of an undue restraint on, or the monopolization of, trade or commerce, is the foundation upon which the prohibitions of the statute rest, and moreover that one of the fundamental purposes of the statute is to protect, not to destroy, rights of property.

Let us, then, as a means of accurately determining what relief we are to afford, first come to consider what relief was afforded by the court below, in order to fix how far it is necessary to take from or add to that relief, to the end that the prohibitions of the statute may have complete and operative force.

The court below, by virtue of §§ 1, 2, and 4 of its decree, which we have in part previously excerpted in the margin, adjudged that the New Jersey corporation, in so far as it held the stock of the various corporations recited in §§ 2 and 4 of the decree, or controlled the same, was a combination in violation of the 1st section of the act, and an attempt to monopolize or a monopolization contrary to the 2d section of the act. It commanded the dissolution of the combination, and therefore in effect directed the transfer by the New Jersey corporation back to the stockholders of the various subsidiary corporations entitled to the same of the stock which had been turned over to the New Jersey company in exchange for its stock. To make this command effective, § 5 of the decree forbade the New Jersey corporation from in any form or manner exercising any ownership or exerting any power directly or indirectly in virtue of its apparent title to the stocks of the subsidiary corporations, and prohibited those subsidiary corporations from paying any dividends to the New Jersey corporations, or doing any act which would recognize further power in that company, except to the extent that it was neces-

sary to enable that company to transfer the stock. So far as the owners of the stock of the subsidiary corporations and the corporations themselves were concerned after the stock had been transferred, § 6 of the decree enjoined them from in any way conspiring or combining to violate the act, or to monopolize or attempt to monopolize in virtue of their ownership of the stock transferred to them, and prohibited all agreements between the subsidiary corporations or other stockholders in the future, tending to produce or bring about further violations of the act.

By § 7, pending the accomplishment of the dissolution of the combination by the transfer of stock, and until it was consummated, the defendants named in § 1, constituting all the corporations to which we have referred, were enjoined from engaging in or carrying on interstate commerce. And by § 9, among other things, a delay of thirty days was granted for the carrying into effect of the directions of the decree.

So far as the decree held that the ownership of the stock of the New Jersey corporation constituted a combination in violation of the 1st section and an attempt to create a monopoly or to monopolize under the 2d section, and commanded the dissolution of the combination, the decree was clearly appropriate. And this also is true of § 5 of the decree, which restrained both the New Jersey corporation and the subsidiary corporations from doing anything which would recognize or give effect to further ownership in the New Jersey corporation of the stocks which were ordered to be retransferred.

But the contention is that, in so far as the relief by way of injunction which was awarded by § 6 against the stockholders of the subsidiary corporations or the subsidiary corporations themselves after the transfer of stock by the New Jersey corporation was completed in conformity to the decree, that the relief awarded was too broad: a. Because it was not sufficiently specific, and tended to cause those who were within the embrace of the order to cease to be under the protection of the law of the land and required them to thereafter conduct their business under the jeopardy of punishments for contempt for violating a general injunction. *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 404, 50 L. ed. 526. Besides it is said that the restraint imposed by § 6—

even putting out of view the consideration just stated—was, moreover, calculated to do injury to the public, and it may be in and of itself to produce the very restraint on the due course of trade which it was intended to prevent. We say this since it does not necessarily follow because an illegal restraint of trade or an attempt to monopolize or a monopolization resulted from the combination and the transfer of the stocks of the subsidiary corporations to the New Jersey corporation that a like restraint or attempt to monopolize or monopolization would necessarily arise from agreements between one or more of the subsidiary corporations after the transfer of the stock by the New Jersey corporation. For illustration, take the pipe lines. By the effect of the transfer of the stock, the pipe lines would come under the control of various corporations instead of being subjected to a uniform control. If various corporations owning the lines determined in the public interests to so combine as to make a continuous line, such agreement or combination would not be repugnant to the act, and yet it might be restrained by the decree. As another example, take the Union Tank Line Company, one of the subsidiary corporations, the owner practically of all the tank cars in use by the combination. If no possibility existed of agreements for the distribution of these cars among the subsidiary corporations, the most serious detriment to the public interest might result. Conceding the merit, abstractly considered, of these contentions, they are irrelevant. We so think, since we construe the sixth paragraph of the decree, not as depriving the stockholders or the corporations, after the dissolution of the combination, of the power to make normal and lawful contracts or agreements, but as restraining them from, by any device whatever, recreating, directly or indirectly, the illegal combination which the decree dissolved. In other words, we construe the sixth paragraph of the decree, not as depriving the stockholders or corporations of the right to live under the law of the land, but as compelling obedience to that law. As therefore the sixth paragraph as thus construed is not amenable to the criticism directed against it and cannot produce the harmful results which the arguments suggest, it was obviously right. We think that, in view of the magnitude of the interests involved and their complexity, the delay of thirty

days allowed for executing the decree was too short and should be extended so as to embrace a period of at least six months. So also, in view of the possible serious injury to result to the public from an absolute cessation of interstate commerce in petroleum and its products by such vast agencies as are embraced in the combination, a result which might arise from that portion of the decree which enjoined carrying on of interstate commerce not only by the New Jersey corporation, but by all the subsidiary companies, until the dissolution of the combination by the transfer of the stocks in accordance with the decree, should not have been awarded.

Our conclusion is that the decree below was right and should be affirmed, except as to the minor matters concerning which we have indicated the decree should be modified. Our order will therefore be one of affirmance, with directions, however, to modify the decree in accordance with this opinion. The court below to retain jurisdiction to the extent necessary to compel compliance in every respect with its decree.

And it is so ordered.

MR. JUSTICE HARLAN, concurring in part and dissenting in part:

A sense of duty constrains me to express the objections which I have to certain declarations in the opinion just delivered on behalf of the court.

I concur in holding that the Standard Oil Company of New Jersey and its subsidiary companies constitute a combination in restraint of interstate commerce, and that they have attempted to monopolize and have monopolized parts of such commerce,—all in violation of what is known as the anti-trust act of 1890. 26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200. The evidence in this case overwhelmingly sustained that view and led the circuit court, by its final decree, to order the dissolution of the New Jersey corporation and the discontinuance of the illegal combination between that corporation and its subsidiary companies.

In my judgment, the decree below should have been affirmed without qualification. But the court, while affirming the decree, directs some modifications in respect of what it characterizes as “minor matters.” It is to be apprehended that

those modifications may prove to be mischievous. In saying this, I have particularly in view the statement in the opinion that "it does not necessarily follow because an illegal restraint of trade or an attempt to monopolize or a monopolization resulted from the combination and the transfer of the stocks of the subsidiary corporations to the New Jersey corporation, that a like restraint of trade or attempt to monopolize or monopolization would necessarily arise from agreements between one or more of the subsidiary corporations after the transfer of the stock by the New Jersey corporation." Taking this language, in connection with other parts of the opinion, the subsidiary companies are thus, in effect, informed—unwisely, I think—that although the New Jersey corporation, being an illegal combination, must go out of existence, *they* may join in an agreement to *restrain commerce* among the states if such restraint be not "undue."

In order that my objections to certain parts of the court's opinion may distinctly appear, I must state the circumstances under which Congress passed the anti-trust act, and trace the course of judicial decisions as to its meaning and scope. This is the more necessary because the court by its decision, when interpreted by the language of its opinion, has not only upset the long-settled interpretation of the act, but has usurped the constitutional functions of the legislative branch of the government. With all due respect for the opinions of others, I feel bound to say that what the court has said may well cause some alarm for the integrity of our institutions. Let us see how the matter stands.

All who recall the condition of the country in 1890 will remember that there was everywhere, among the people generally, a deep feeling of unrest. The nation had been rid of human slavery,—fortunately, as all now feel,—but the conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people; namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessities of life. Such a danger was thought to be then imminent, and all felt that it must be

met firmly and by such statutory regulations as would adequately protect the people against oppression and wrong. Congress therefore took up the matter and gave the whole subject the fullest consideration. All agreed that the national government could not, by legislation, regulate the domestic trade carried on wholly within the several states; for power to regulate such trade remained with, because never surrendered by, the states. But, under authority expressly granted to it by the Constitution, Congress could regulate commerce among the several states and with foreign states. Its authority to regulate such commerce was and is paramount, due force being given to other provisions of the fundamental law, devised by the fathers for the safety of the government and for the protection and security of the essential rights inhering in life, liberty, and property.

Guided by these considerations, and to the end that the people, *so far as interstate commerce* was concerned, might not be dominated by vast combinations and monopolies, having power to advance their own selfish ends, regardless of the general interests and welfare, Congress passed the anti-trust act of 1890 in these words (the italics here and elsewhere in this opinion are mine):

“§ 1. *Every* contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal. Every person who shall make *any such contract or engage in any such combination or conspiracy* shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. § 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, *any part* of the trade or commerce among the several states or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. § 3. *Every* contract, combination in form of trust *or otherwise*, or conspiracy, in

restraint of trade or commerce in any territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such territory and another, or between any such territory or territories and any state or states or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations, is hereby declared illegal. Every person who shall make any *such* contract or engage in any *such* combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200.

The important inquiry in the present case is as to the meaning and scope of that act in its application to interstate commerce.

In 1896 this court had occasion to determine the meaning and scope of the act in an important case known as the Trans-Missouri Freight Case, 166 U. S. 290, 41 L. ed. 1007. The question there was as to the validity under the anti-trust act of a certain agreement between numerous railroad companies, whereby they formed an association for the purpose of establishing and maintaining rates, rules, and regulations in respect of freight traffic over specified routes. Two questions were involved: first, whether the act applied to railroad carriers; second, whether the agreement which was the basis of the suit which the United States brought to have the agreement annulled was illegal. The court held that railroad carriers were embraced by the act. In determining that question, the court, among other things, said:

"The language of the act includes *every* contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations. So far as the very terms of the statute go, they apply to *any* contract of the nature described. A contract, therefore, that is in restraint of trade or commerce, is, by the strict language of the act, prohibited, even though such contract is entered into between competing common carriers by railroad, and only for the purposes of thereby affecting

traffic rates for the transportation of persons and property. If such an agreement restrains trade or commerce, it is prohibited by the statute, unless it can be said that an agreement, no matter what its terms, relating only to transportation, cannot restrain trade or commerce. We see no escape from the conclusion that if an agreement of such a nature does restrain it, the agreement is condemned by this act. . . . Nor is it for the substantial interests of the country that any one commodity should be within the sole power and subject to the sole will of one powerful combination of capital. Congress has, so far as its jurisdiction extends, prohibited *all* contracts or combinations in the form of trusts entered into for the purpose of restraining trade and commerce. . . . While the statute prohibits all combinations in the form of trusts or otherwise, the limitation is not confined to that form alone. *All combinations which are in restraint of trade or commerce are prohibited, whether in the form of trusts or in any other form whatever.*" 166 U. S. 290, 312, 324, 326.

The court then proceeded to consider the second of the above questions, saying: "The next question to be discussed is as to what is the true construction of the statute, assuming that it applies to common carriers by railroad. What is the meaning of the language as used in the statute, that 'every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal?' Is it confined to a contract or combination which is only in unreasonable restraint of trade or commerce, or does it include what the language of the act plainly and in terms covers,—all contracts of that nature? . . . It is now with much amplification of argument urged that the statute, in declaring illegal every combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, does not mean what the language used therein plainly imports, but that it only means to declare illegal any such contract which is in *unreasonable* restraint of trade, while leaving all others unaffected by the provisions of the act; that the common-law meaning of the term 'contract in restraint of trade' includes only such contracts as are in *unreasonable* restraint of trade; and when that term is used in the Federal statute it

is not intended to include all contracts in restraint of trade, but only those which are in unreasonable restraint thereof. . . . By the simple use of the term 'contract in restraint of trade,' *all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade.* When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but *all* contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress. . . . If only that kind of contract which is in unreasonable restraint of trade be within the meaning of the statute, and declared therein to be illegal, it is at once apparent that the subject of what is a reasonable rate is attended with great uncertainty. . . . To say, therefore, that the act excludes agreements which are not in unreasonable restraint of trade, and which tend simply to keep up reasonable rates for transportation, is substantially to leave the question of reasonableness to the companies themselves. . . . But assuming that agreements of this nature are not void at common law, and that the various cases cited by the learned courts below show it, the answer to the statement of their validity now is to be found *in the terms of the statute* under consideration. . . . The arguments which have been addressed to us against the inclusion of all contracts in restraint of trade, as provided for by the language of the act, have been based upon the alleged presumption that Congress, notwithstanding the language of the act, could not have intended to embrace all contracts, but only such contracts as were in unreasonable restraint of trade. Under these circumstances we are, therefore, asked to hold that the act of Congress excepts contracts which are not in unreasonable restraint of trade, and which only keep rates up to a reasonable price, notwithstanding the language of the act makes no such exception. In other words, we are asked to read into the act *by way of judicial legislation an exception that is not placed there by the lawmaking branch of the government*, and this is to be

done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed Congress intended the natural import of the language it used. *This we cannot and ought not to do.* . . .

“If the act ought to read, as contended for by defendants, *Congress is the body to amend it, and not this court, by a process of judicial legislation wholly unjustifiable.* Large numbers do not agree that the view taken by defendants is sound or true in substance, and Congress may and very probably did share in that belief in passing the act. The public policy of the government is to be found *in its statutes*, and when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials; but when the lawmaking power speaks upon a particular subject, over which it has constitutional power to legislate, *public policy in such a case is what the statute enacts.* If the law prohibit any contract or combination in restraint of trade or commerce, a contract or combination made in violation of such law is void, whatever may have been theretofore decided by the courts to have been the public policy of the country on that subject. The conclusion which we have drawn from the examination above made into the question before us is that the anti-trust act applies to railroads, and that it renders illegal *all* agreements which are *in restraint* of trade or commerce as we have above defined that expression, and the question then arises whether the agreement before us is of that nature.”

I have made these extended extracts from the opinion of the court in the Trans-Missouri Freight Case in order to show beyond question that the point was there urged by counsel that the anti-trust act condemned *only* contracts, combinations, trusts, and conspiracies that were in *unreasonable* restraint of interstate commerce, and that the court in clear and decisive language met that point. It adjudged that Congress had in unequivocal words declared that “*every* contract, combination in the form of trust or otherwise, or conspiracy, in restraint of commerce among the several states,” shall be illegal, and that no distinction, *so far as interstate commerce was concerned*, was to be tolerated between restraints of such commerce as were undue or unreasonable, and restraints that were due or reasonable. With full knowledge of the then condition

of the country and of its business, Congress determined to meet, and did meet, the situation by an absolute, statutory prohibition of "*every* contract, combination in the form of trusts or otherwise, in restraint of trade or commerce." Still more; in response to the suggestion by able counsel that Congress intended only to strike down such contracts, combinations, and monopolies as unreasonably restrained interstate commerce, this court, in words too clear to be misunderstood, said that to so hold was "to read into the act by way of *judicial legislation*, an exception not placed there by the lawmaking branch of the government." "This," the court said, as we have seen, "*we cannot and ought not to do.*"

It thus appears that fifteen years ago, when the purpose of Congress in passing the anti-trust act was fresh in the minds of courts, lawyers, statesmen, and the general public, this court expressly declined to indulge in judicial legislation, by inserting in the act the word "unreasonable" or any other word of like import. It may be stated here that the country at large accepted this view of the act, and the Federal courts throughout the entire country enforced its provisions according to the interpretation given in the Freight Association Case. What, then, was to be done by those who questioned the soundness of the interpretation placed on the act by this court in that case? As the court had decided that to insert the word "unreasonable" in the act would be "judicial legislation" on its part, the only alternative left to those who opposed the decision in that case was to induce Congress to so *amend* the act as to recognize the right to restrain interstate commerce to a *reasonable* extent. The public press, magazines, and law journals, the debates in Congress, speeches and addresses by public men and jurists, all contain abundant evidence of the general understanding that the meaning, extent, and scope of the anti-trust act had been judicially determined by this court, and that the only question remaining open for discussion was the wisdom of the policy declared by the act,—a matter that was exclusively within the cognizance of Congress. But at every session of Congress since the decision of 1896, the lawmaking branch of the government, with full knowledge of that decision, has refused to change the policy it had declared, or to so amend the act of 1890 as to except

from its operation contracts, combinations, and trusts that *reasonably* restrain interstate commerce.

But those who were in combinations that were illegal did not despair. They at once set up the baseless claim that the decision of 1896 disturbed the "business interests of the country," and let it be known that they would never be content until the rule was established that would permit interstate commerce to be subjected to *reasonable* restraints. Finally, an opportunity came again to raise the same question which this court had, upon full consideration, determined in 1896. I now allude to the case of *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25, decided in 1898. What was that case?

It was a suit by the United States against more than thirty railroad companies, to have the court declare illegal, under the anti-trust act, a certain agreement between these companies. The relief asked was denied in the subordinate Federal courts and the government brought the case here.

It is important to state the points urged in that case by the defendant companies charged with violating the anti-trust act, and to show that the court promptly met them. To that end I make a copious extract from the opinion in the Joint Traffic Case. Among other things, the court said: "Upon comparing that agreement [the one in the Joint Traffic Case, then under consideration (171 U. S. 505)] with the one set forth in the case of *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, the great similarity between them suggests that a similar result should be reached in the two cases." (P. 558.) Learned counsel in the Joint Traffic Case urged a reconsideration of the question decided in the Trans-Missouri Case, contending that "the decision in that case [the Trans-Missouri Freight Case] is quite plainly erroneous, and the consequences of such error are far-reaching and disastrous, and clearly at war with justice and sound policy, and the construction placed upon the anti-trust statute has been received by the public with surprise and alarm." They suggested that the point made in the Joint Traffic Case as to the meaning and scope of the act might have been, but was not, made in the previous case. The court said (171 U. S. 559) that "the report of the Trans-Missouri Case clearly shows

not only that the point now taken *was* there urged upon the attention of the court, but it was then *intentionally* and *necessarily* decided."

The question whether the court should again consider the point decided in the Trans-Missouri Case was disposed of in the most decisive language, as follows: "Finally, we are asked to reconsider the question decided in the Trans-Missouri Case, and to retrace the steps taken therein, because of the plain error contained in that decision and the widespread alarm with which it was received, and the serious consequences which have resulted, or may soon result, from the law as interpreted in that case. It is proper to remark that an application for a reconsideration of a question but lately decided by this court is usually based upon a statement that some of the arguments employed on the original hearing of the question have been overlooked or misunderstood, or that some controlling authority has been either misapplied by the court or passed over without discussion or notice. While this is not strictly an application for a rehearing in the same case, yet in substance it is the same thing. The court is asked to reconsider a question but just decided after a careful investigation of the matter involved. There have heretofore been in effect two arguments of precisely the same questions now before the court, and the same arguments were addressed to us on both those occasions. The report of the Trans-Missouri Case shows a dissenting opinion delivered in that case, and that the opinion was concurred in by three other members of the court. That opinion, it will be seen, gives with great force and ability the arguments against the decision which was finally arrived at by the court. It was after a full discussion of the questions involved, and with the knowledge of the views entertained by the minority, as expressed in the dissenting opinion, that the majority of the court came to the conclusion it did. Soon after the decision a petition for a rehearing of the case was made, supported by a printed argument in its favor, and pressed with an earnestness and vigor and at a length which were certainly commensurate with the importance of the case. This court, *with care and deliberation* and also with a full appreciation of their importance, again considered the questions involved in its former decision. A majority of the

court once more arrived at the conclusion it had first announced, and accordingly it denied the application. And now *for the third time* the same arguments are employed, and the court is again asked to recant its former opinion, and to decide the same question in direct opposition to the conclusion arrived at in the Trans-Missouri Case. The learned counsel, while making the application, frankly confess that the argument in opposition to the decision in the case above named has been so fully, so clearly, and so forcibly presented in the dissenting opinion of Mr. Justice WHITE [in the Freight Case] that it is hardly possible to add to it, nor is it necessary to repeat it. The fact that there was so close a division of opinion in this court when the matter was first under advisement, together with the different views taken by some of the judges of the lower courts, led us to the most careful and scrutinizing examination of the arguments advanced by both sides, and it was after such an examination that the majority of the court came to the conclusion it did. It is not now alleged that the court on the former occasion overlooked any argument for the respondents or misapplied any controlling authority. It is simply insisted that the court, notwithstanding the arguments for an opposite view, arrived at an erroneous result, which, for reasons already stated, ought to be reconsidered and reversed. *As we have twice already deliberately and earnestly considered the same arguments which are now for the third time pressed upon our attention*, it could hardly be expected that our opinion should now change from that already expressed."

These utterances, taken in connection with what was previously said in the Trans-Missouri Freight Case, show so clearly and affirmatively as to admit of no doubt that this court, many years ago, upon the fullest consideration, interpreted the anti-trust act as prohibiting and making illegal not only *every* contract or combination, in whatever form, which was in restraint of interstate commerce, without regard to its reasonableness or unreasonableness, but all monopolies or attempt to monopolize "any part" of such trade or commerce. Let me refer to a few other cases in which the scope of the decision in the Freight Association Case was referred to: In *E. Bement & Sons v. National Harrow Co.* 186 U. S. 70, 92, 46 L. ed. 1058,

1069, the court said: "It is true that it has been held by this court that the act (anti-trust act) included any restraint of commerce, whether *reasonable or unreasonable*,"—citing *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007; *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136. In *W. Y. Montague & Co. v. Lowry*, 193 U. S. 38, 46, 48 L. ed. 608, 611, which involved the validity, under the anti-trust act, of a certain association formed for the sale of tiles, mantels, and grates, the court, referring to the contention that the sale of tiles in San Francisco was so small "as to be a negligible quantity," held that the association was nevertheless a combination in restraint of interstate trade or commerce, in violation of the anti-trust act. In *Loewe v. Lawlor*, 208 U. S. 274, 297, 52 L. ed. 488, 498, 13 A. & E. Ann. Cas. 815, all the members of this court concurred in saying that the *Trans-Missouri Joint Traffic*, and *Northern Securities* [193 U. S. 197, 48 L. ed. 679] Cases "hold in effect that the anti-trust law has a broader application than the prohibition of restraints of trade unlawful at common law." In *Shawnee Compress Co. v. Anderson* (1908) 209 U. S. 423, 432, 52 L. ed. 865, 874, all the members of the court again concurred in declaring that "it has been decided that not only unreasonable but all direct restraints of trade are prohibited, the law being thereby distinguished from the common law." In *United States v. Addyston Pipe & Steel Co.* 46 L. R. A. 122, 29 C. C. A. 141, 54 U. S. App. 723, Judge TART, speaking for the circuit court of appeals of the sixth circuit, said that according to the decision of this court in the *Freight Association Case*, "contracts in restraint of interstate transportation were within the statute, whether the restraints could be regarded as reasonable at common law or not." In *Chesapeake & O. Fuel Co. v. United States* (1902) 53 C. C. A. 256, the circuit court of appeals for the sixth circuit, after referring to the right of Congress to regulate interstate commerce, thus interpreted the prior decisions of this court in the *Trans-Missouri*, the *Joint Traffic*, and the *Addyston Pipe & Steel Co.* Cases: "In the exercise of this right, Congress has seen fit to prohibit *all* contracts in restraint of trade. It has not left to the courts the consideration of the question whether such

restraint is reasonable or unreasonable, or whether the contract would have been illegal at the common law or not. The act leaves for consideration by judicial authority no question of this character, but *all* contracts and combinations are declared illegal if in restraint of trade or commerce among the states." As far back as *Robbins v. Taxing District*, 120 U. S. 489, 497, 30 L. ed. 694, 697, 1 Inters. Com. Rep. 45, it was held that certain local regulations subjecting drummers engaged in both interstate and domestic trade could not be sustained by reason of the fact that no discrimination was made among citizens of the different states. The court observed that this did not meet the difficulty, for the reason that "interstate commerce cannot be taxed *at all*." Under this view Congress no doubt acted when by the anti-trust act it forbade *any* restraint whatever upon interstate commerce. It manifestly proceeded upon the theory that interstate commerce could not be restrained *at all* by combinations, trusts, or monopolies, but must be allowed to flow in its accustomed channels, wholly unvexed and unobstructed by anything that would restrain its ordinary movement. See also *Minnesota v. Barber*, 136 U. S. 313, 326, 34 L. ed. 455, 460, 3 Inters. Com. Rep. 185; *Brimmer v. Rebman*, 138 U. S. 78, 82, 83, 34 L. ed. 862, 864, 3 Inters. Com. Rep. 485.

In the opinion delivered on behalf of the minority in the Northern Securities Case, 193 U. S. 197, our present chief justice referred to the contentions made by the defendants in the Freight Association Case, namely, one of which was that the agreement there involved did not unreasonably restrain interstate commerce, and said: "Both these contentions were decided against the association, the court holding that the anti-trust act did embrace interstate carriage by railroad corporations, and as that act prohibited *any* contracts in restraint of interstate commerce, *it hence embraced all contracts of that character, whether they were reasonable or unreasonable.*" One of the justices who dissented in the Northern Securities Case in a separate opinion, concurred in by the minority, thus referred to the Freight and Joint Traffic Cases: "For it cannot be too carefully remembered that that clause applies to 'every' contract of the forbidden kind,—a consideration which was the turning point of the Trans-Missouri Freight Associa-

tion Case. . . . Size has nothing to do with the matter. A monopoly of 'any part' of commerce among the states is unlawful."

In this connection it may be well to refer to the adverse report made in 1909, by Senator Nelson, on behalf of the Senate Judiciary Committee, in reference to a certain bill offered in the Senate, and which proposed to amend the anti-trust act in various particulars. That report contains a full, careful, and able analysis of judicial decisions relating to combinations and monopolies in restraint of trade and commerce. Among other things said in it which bear on the questions involved in the present case are these: "The anti-trust act makes it a criminal offense to violate the law, and provides a punishment both by fine and imprisonment. To inject into the act the question of whether an agreement or combination is *reasonable* or *unreasonable* would render the act as a criminal or penal statute indefinite and uncertain, and hence, to that extent, utterly nugatory and void, and would practically amount to a repeal of that part of the act. . . . And while the same technical objection does not apply to civil prosecutions, *the injection of the rule of reasonableness or unreasonableness would lead to the greatest variableness and uncertainty in the enforcement of the law. The defense of reasonable restraint would be made in every case, and there would be as many different rules of reasonableness as cases, courts, and juries.* What one court or jury might deem unreasonable another court or jury might deem reasonable. A court or jury in Ohio might find a given agreement or combination reasonable, while a court and jury in Wisconsin might find the same agreement and combination unreasonable. In the case of the *People v. Sheldon*, 139 N. Y. 264, 23 L. R. A. 221, 36 Am. St. Rep. 690, Chief Justice Andrews remarks: 'If agreements and combinations to prevent competition in prices are or may be hurtful to trade, *the only sure remedy is to prohibit all agreements of that character.* If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult in any case to establish the invalidity, although the moral evidence might be very convincing.' . . . To amend the anti-trust act, as suggested by this bill, would be to entirely emasculate it, and

for all practical purposes render it nugatory as a remedial statute. Criminal prosecutions would not lie, and civil remedies would labor under the greatest doubt and uncertainty. The act as it exists is clear, comprehensive, certain, and highly remedial. It practically covers the field of Federal jurisdiction, and is in every respect a model law. To destroy or undermine it at the present juncture, when combinations are on the increase, and appear to be as oblivious as ever of the rights of the public, would be a calamity." The result was the indefinite postponement by the Senate of any further consideration of the proposed amendments of the anti-trust act.

After what has been adjudged, upon full consideration, as to the meaning and scope of the anti-trust act, and in view of the usages of this court when attorneys for litigants have attempted to reopen questions that have been deliberately decided, I confess to no little surprise as to what has occurred in the present case. The court says that the previous cases, above cited, "cannot by any possible conception be treated as authoritative without the certitude that *reason* was resorted to for the purpose of deciding them." And its opinion is full of intimations that this court proceeded in those cases, so far as the present question is concerned, without being guided by the "rule of reason" or "the light of reason." It is more than once intimated, if not suggested, that if the anti-trust act is to be construed as prohibiting *every* contract or combination, of whatever nature, which is in fact in restraint of commerce, regardless of the reasonableness or unreasonableness of such restraint, that fact would show that the court had not proceeded, in its decision, according to "the light of reason," but had disregarded the "rule of reason." If the court, in those cases, was wrong in its construction of the act, it is certain that it fully apprehended the views advanced by learned counsel in previous cases and pronounced them to be untenable. The published reports place this beyond all question. The opinion of the court was delivered by a justice of wide experience as a judicial officer, and the court had before it the Attorney General of the United States and lawyers who were recognized, on all sides, as great leaders in their profession. The same eminent jurist who delivered the opinion in the *Trans-Missouri Case* delivered the opinion in the *Joint Traffic*

Case, while the Association in the latter case was represented by lawyers whose ability was universally recognized. Is it to be supposed that any point escaped notice in those cases when we think of the sagacity of the justice who expressed the views of the court, or of the ability of the profound, astute lawyers who sought such an interpretation of the act as would compel the court to insert words in the statute which Congress had not put there, and the insertion of which words would amount to "judicial legislation"? Now this court is asked to do that which it has distinctly declared it could not and would not do, and has now done what it then said it could not constitutionally do. It has, by mere interpretation, modified the act of Congress, and deprived it of practical value as a defensive measure against the evils to be remedied. On reading the opinion just delivered, the first inquiry will be, that as the court is unanimous in holding that the particular things done by the Standard Oil Company and its subsidiary companies, in this case, were illegal under the anti-trust act, whether those things were in reasonable or unreasonable restraint of interstate commerce, why was it necessary to make an elaborate argument, as is done in the opinion, to show that according to the "rule of reason" the act as passed by Congress should be interpreted as if it contained the word "unreasonable" or the word "undue"? The only answer which, in frankness, can be given to this question, is, that the court intends to decide that its deliberate judgment, fifteen years ago, to the effect that the act permitted no restraint whatever of interstate commerce, whether reasonable or unreasonable, was not in accordance with the "rule of reason." In effect the court says that it will now, for the first time, bring the discussion under the "light of reason," and apply the "rule of reason" to the questions to be decided. I have the authority of this court for saying that such a course of proceeding on its part would be "judicial legislation."

Still more, what is now done involves a serious departure from the settled usages of this court. Counsel have not ordinarily been allowed to discuss questions already settled by previous decisions. More than once at the present term, that rule has been applied. In *St. Louis, L. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. ed. 1061, the court had occasion

to determine the meaning and scope of the original safety appliance act of Congress, passed for the protection of railroad employees and passengers on interstate trains. 27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174. A particular construction of that act was insisted upon by the interstate carrier which was sued under the safety appliance act; and the contention was that a different construction than the one insisted upon by the carrier would be a harsh one. After quoting the words of the act, Mr. Justice Moody said for the court: "There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the legislature was *to supplant the qualified duty of the common law with an absolute duty deemed by it more just*. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. *They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body.* . . . It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are, in the main, helpless in that regard. Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended, and to seek some unnatural interpretation of common words. We see no error in this part of the case." And at the present term of this court we were asked, in a case arising under the safety appliance act, to reconsider the question decided in the Taylor Case. We declined to do so, saying in an opinion just now handed down: "In view of these facts, we are unwilling to regard the question as to the meaning and scope of the safety appliance act, so far as it relates to automatic couplers on trains moving interstate traffic, as open

to further discussion here. *If the court was wrong in the Taylor Case, the way is open for such an amendment of the statute as Congress may, in its discretion, deem proper.* This court ought not now disturb what has been so widely accepted and acted upon by the courts as having been decided in that case. A contrary course would cause infinite uncertainty, if not mischief, in the administration of the law in the Federal courts. To avoid misapprehension, it is appropriate to say that we are not to be understood as questioning the soundness of the interpretation heretofore placed by this court upon the safety appliance act. We only mean to say that until Congress, by an amendment of the statute, changes the rule announced in the Taylor Case, this court will adhere to and apply that rule." *Chicago, B. & Q. R. Co. v. United States*, 220 U. S. 559, 55 L. ed. 582. When counsel in the present case insisted upon a reversal of the former rulings of this court, and asked such an interpretation of the anti-trust act, as would allow reasonable restraints of interstate commerce, this court, in deference to established practice, should, I submit, have said to them: "That question, according to our practice, is not open for further discussion here. This court long ago deliberately held (1) that the act, interpreting its words in their ordinary acceptance, prohibits all restraints of interstate commerce by combinations in whatever form, and whether reasonable or unreasonable; (2) the question relates to matters of public policy in reference to commerce among the states and with foreign nations, and Congress alone can deal with the subject; (3) this court would encroach upon the authority of Congress if, under the guise of construction, it should assume to determine a matter of public policy; (4) the parties must go to Congress and obtain an amendment of the anti-trust act if they think this court was wrong in its former decisions; and (5) this court cannot and will not *judicially legislate*, since its function is to declare the law, while it belongs to the legislative department to make the law." Such a course, I am sure, would not have offended the "rule of reason."

But my brethren, in their wisdom, have deemed it best to pursue a different course. They have now said to those who condemn our former decisions and who object to all legislative prohibitions of contracts, combinations, and trusts in restraint

of interstate commerce, "You may *now* restrain such commerce, provided you are reasonable about it; only take care that the restraint is not undue." The disposition of the case under consideration, according to the views of the defendants, will, it is claimed, quiet and give rest to "the business of the country." On the contrary, I have a strong conviction that it will throw the business of the country into confusion and invite widely-extended and harassing litigation, the injurious effects of which will be felt for many years to come. When Congress prohibited *every* contract, combination, or monopoly, in restraint of commerce, it prescribed a simple, definite rule that all could understand, and which could be easily applied by everyone wishing to obey the law, and not to conduct their business in violation of law. But now, it is to be feared, we are to have, in cases without number, the constantly recurring inquiry—difficult to solve by proof—whether the particular contract, combination, or trust involved in each case is or is not an "unreasonable" or "undue" restraint of trade. Congress, in effect, said that there should be *no* restraint of trade, *in any form*, and this court solemnly adjudged many years ago that Congress meant what it thus said in clear and explicit words, and that it *could not* add to the words of the act. But those who condemn the action of Congress are now, in effect, informed that the courts will allow such restraint of interstate commerce as are shown not to be unreasonable or undue.

It remains for me to refer, more fully than I have heretofore done, to another, and, in my judgment,—if we look to the future,—the most important, aspect of this case. That aspect concerns the usurpation by the judicial branch of the government of the functions of the legislative department. The illustrious men who laid the foundations of our institutions deemed no part of the national Constitution of more consequence or more essential to the permanency of our form of government than the provisions under which were distributed the powers of government among three separate, equal, and co-ordinate departments,—legislative, executive, and judicial. This was at that time a new feature of governmental regulation among the nations of the earth, and it is deemed by the people of every section of our own country as most vital in the workings of a representative republic whose Con-

stitution was ordained and established in order to accomplish the objects stated in its Preamble by the means, *but only by the means*, provided, either expressly or by necessary implication, by the instrument itself. No department of that government can constitutionally exercise the powers committed strictly to another and separate department.

I said at the outset that the action of the court in this case might well alarm thoughtful men who revered the Constitution. I meant by this that many things are intimated and said in the court's opinion which will not be regarded otherwise than as sanctioning an invasion by the judiciary of the constitutional domain of Congress,—an attempt by interpretation to soften or modify what some regard as a harsh public policy. This court, let me repeat, solemnly adjudged many years ago that it could not, except by "*judicial legislation*," read words into the anti-trust act not put there by Congress, and which, being inserted, gives it a meaning which the words of the act, as passed, if properly interpreted, would not justify. The court has decided that it could not thus change a public policy formulated and declared by Congress; that Congress has paramount authority to regulate interstate commerce, and that it alone can change a policy once inaugurated by legislation. The courts have nothing to do with the wisdom or policy of an act of Congress. Their duty is to ascertain the will of Congress, and if the statute embodying the expression of that will is constitutional, the courts must respect it. They have no function to declare a public policy, nor to *amend legislative enactments*. "What is termed the policy of the government with reference to any particular legislation," as this court has said, "is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes." *Hadden v. The Collector* (*Hadden v. Barney*), 5 Wall. 107, 18 L. ed. 518. Nevertheless, if I do not misapprehend its opinion, the court has now read into the act of Congress words which are not to be found there, and has thereby done that which it adjudged in 1896 and 1898 could not be done without violating the Constitution; namely,

by interpretation of a statute changed a public policy declared by the legislative department.

After many years of public service at the national capital, and after a somewhat close observation of the conduct of public affairs, I am impelled to say that there is abroad in our land a most harmful tendency to bring about the amending of constitutions and legislative enactments by means alone of judicial construction. As a public policy has been declared by the legislative department in respect of interstate commerce, over which Congress has entire control, under the Constitution, all concerned must patiently submit to what has been lawfully done, until the people of the United States—the source of all national power—shall, in their own time, upon reflection and through the legislative department of the government, require a change of that policy. There are some who say that it is a part of one's liberty to conduct commerce among the states without being subject to governmental authority. But that would not be liberty regulated by law, and liberty which cannot be regulated by law is not to be desired. The supreme law of the land, which is binding alike upon all,—upon Presidents, Congresses, the courts and the people,—gives to Congress, and to Congress alone, authority to regulate interstate commerce, and when Congress forbids *any* restraint of such commerce, in any form, all must obey its mandate. To overreach the action of Congress merely by judicial construction, that is, by indirection, is a blow at the integrity of our governmental system, and in the end will prove most dangerous to all. Mr. Justice BRADLEY wisely said, when on this bench, that illegitimate and unconstitutional practices get their first footing by silent approaches and slight deviations from legal modes of legal procedure. *Boyd v. United States*, 116 U. S. 616, 635, 29 L. ed. 746, 752. We shall do well to heed the warnings of that great jurist.

I do not stop to discuss the merits of the policy embodied in the anti-trust act of 1890; for, as has been often adjudged, the courts, under our constitutional system, have no rightful concern with the wisdom or policy of legislation enacted by that branch of the government which alone can make laws.

For the reasons stated, while concurring in the general affirmance of the decree of the Circuit Court, I dissent from

that part of the judgment of this court which directs the modification of the decree of the Circuit Court, as well as from those parts of the opinion which, in effect, assert authority in this court to insert words in the anti-trust act which Congress did not put there, and which, being inserted, Congress is made to declare, as part of the public policy of the country, what it has not chosen to declare.³³

STANDARD SANITARY MFG. CO. v. UNITED STATES

(Supreme Court of United States, 1912. 226 U. S. 20.)

MR. JUSTICE McKENNA ³⁴ delivered the opinion of the court:

Suit by the government against appellants for a violation by them of the act of July 2, 1890 [26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200], commonly known as the Sherman anti-trust act.

A decree was entered in favor of the government, from which appellants (designated herein as defendants) have prosecuted this appeal. 191 Fed. 172.

There are sixteen corporate and thirty-four individual defendants, the latter, with the exception of Edwin L. Wayman, being the officers, presidents, or secretaries, of the companies.

The corporate defendants were alleged to be the manufacturers of enameled ironware in various places in the United States, manufacturing 85 per cent of such ware, and engaged in interstate commerce in such ware throughout the United States and with foreign countries, in competition with one another and with certain other manufacturers of such ware, and that in 1909, or early in 1910, they entered into and engaged in a combination and conspiracy to restrain such trade and commerce.

The defendants denied the charges against them, Wayman

33—Immediately following the case of *Standard Oil Co. v. United States*, is the case of *United States v. American Tobacco Co.*, 221 U. S. 106.

34—Only the opinion of the court is given.

doing so in a separate answer. The Colwell Lead Company denied that it was engaged in interstate commerce.

A great deal of testimony was taken and the case quite elaborately argued, but in the view we take of it it is in comparatively narrow compass, depending upon the application of well-settled principles.

The corporate defendants are manufacturers of sanitary enameled ironware, such as bath tubs, wash bowls, drinking fountains, sinks, closets, etc. The enameling consists in applying opaque white glass to iron utensils, first in the condition of a liquid, and, second, in the form of a powder. The process consists in heating the utensils to a red heat and then sifting upon it the enameling powder. The powder is fused by the high temperature, and forms on the utensil a hard, impenetrable, insoluble, smooth, and glossy surface.

Prior to the invention of James W. Arrott, Jr., covered by letters patent issued September 26, 1899, the enameling powder was applied by a sieve attached to a long handle, which was held by the workman with one hand, and the sieve made to vibrate by the workman striking the handle with his other hand, thereby sifting the powder over the surface of the ironware. The implement was an imperfect one, not easily handled, and by its use the workmen were subjected to intense heat and physical strain. The flow of the powder, beside, was not continuous; it was cast upon the metal in intermittent puffs, causing in many instances an unequal distribution of the powder and producing defective articles which either had to be thrown away or sold as "seconds." With Arrott's invention these evil results are lessened or disappear. The sieve is mechanically vibrated very rapidly, causing, instead of an intermittent flow of the powder as in the hand process, a practically continuous flow. Both hands of the workman may be used to guide and direct the sieve. The advantages of the instrument over the hand process are decided. It is more efficient and more economical. It makes a better article and in less time. There is no waste in defects or "seconds." The workman is relieved to some extent from "fierce heat conditions," to quote from the answers.

At the time of the contracts which are attacked by the government the Standard Sanitary Manufacturing Company

was the owner of the patent and manufacturer of 50 per cent of the ware, and used in its production the patented device. Some of the other manufacturers were infringing and controversies existed. Some yielded to its validity, others contested it. It was sustained by the courts in several cases.

We have gone through this detail to exhibit the conditions, as asserted by defendants, which confronted them and induced their contracts. In further display of it we quote Wayman's answer, as follows:

"For the reasons stated, the art was in a very unsatisfactory condition. No means had been discovered of accomplishing the result produced by the use of the Arrott invention without laying the user of such means open to a suit for infringement, by the owner of the Arrott patent. The manufacturers using the process in use prior to Arrott's invention were unable to successfully compete with those using the Arrott invention, and, moreover, produced a disproportionate number of defective, unsightly and substantially unsalable articles. The consumer was deceived and defrauded and the use of sanitary enameled ironware lessened and its reputation depreciated by defective articles being palmed off on the consumer as not defective."

On the situation thus asserted to exist, the defendants build their defense, contending that Wayman saw its evils and conceived the way to correct them; and insist that the following facts are established by the evidence: Wayman was familiar, through his connection with another enameling company, called the Seamless Steel Bath Tub Company, with the enamel ware trade, and had become convinced of the advantages, indeed, necessity, of the use of the Arrott invention. He tried to secure it, but the Standard Company seemed unwilling at that time to confer its utility upon other companies, and pending the negotiations the Seamless Company failed and Wayman turned to other plans, one of which resulted in the contracts under review.

As early as 1908, impressed with the importance of the Arrott patent, he endeavored to have the Standard Company grant licenses to other companies in order to improve trade conditions, and to this end he tried to interest other gentlemen in the project. The Standard Company was unwilling to

grant, and other manufacturers were equally disinclined to accept, them. He then conceived the idea of a holding company, but this failed also, the Standard still being unyielding, stating by one of its officers that "his company was unwilling either to sell the Arrott patent or to enter into any arrangement which would lessen the advantage which it had by reason of the ownership of the Arrott patent." The plan was therefore abandoned.

In August, 1909 (we are still following the version of the testimony given by counsel for defendants), it was suggested to Wayman by a person connected with one of the manufacturing companies that he (Wayman) apply for the position of secretary of the Association of Sanitary Enameled Ware Manufacturers which was about to be reorganized. The position, it was said, would give Wayman an excellent opportunity to continue his efforts to buy the Arrott patent, and establish such relation with the manufacturers of enameled ware as would enable him to present in the most favorable manner his ideas in regard to the advantages of patent licenses under the Arrott patent. This association was a pure trade organization, and not formed to control or regulate prices. Wayman applied for and obtained the position, and commenced again negotiations for the Arrott patent, and persisted, against the apparent reluctance of the Standard Company to give up the advantages of the patent. Finally he impressed the manager of the Standard factories with the greater advantages which would come to his company by the elimination of "seconds," and removing them as competitors of the better articles of the Standard, confining the competition to such articles, of which the Standard produced 50 per cent. The manager of the Standard and that company yielded to the representation of these advantages.

These advantages are dwelt on and made much of by counsel and they quote testimony to display their extent, "Seconds," as we have said, were articles of inferior or defective manufacture, and as their inferiority was not apparent, they could be represented and sold as of standard quality. Such deception, it is asserted, was frequently practised, and the articles turning out defective discredited enamel ware, gave it a bad reputation, and there was a growing difficulty to maintain or

extend its sale. With "seconds" out of the way, it may be conceded, as it is contended, that only honest articles were available to plumbers, jobbers, and builders.

The Standard Company fixed a price upon the Arrott patent and gave Wayman an option upon it. He, in the following December, secured also an option from the J. L. Mott Iron Works upon a patent called the Dithridge, and from the L. Wolff Manufacturing Company an option upon the Lindsay patent. These patents were infringements of the Arrott device. Thus equipped, Wayman proceeded to engage the manufacturers in his proposition.

This summary of the situation counsel have supplemented by a declaration of motives. Counsel say that Wayman and the manufacturers were advised by able and competent lawyers of the legality of their plan. "Wayman's motive," it is asserted, "was to make money for himself, not as a manufacturer, but as the owner of a patent, receiving royalties from those whom he licensed to use his patented invention." The form of his license, it is further asserted, followed the precedents, and was based on that principle of the patent law which gives to the owner of an invention the power to grant to others its use or to withhold it, or to grant it upon such terms as he may choose to impose. Such being his motive and such being his right, he, it is contended, negotiated with and contracted with the manufacturers of enameled ware. And their motives also are attempted to be justified, though the necessity for doing so is disclaimed.

Wayman's right, it seems to be contended, is all-sufficient, and that the manufacturers only paid the price that he could legally demand. As the demand was legal, it is argued, the payment of the price could not be illegal. But the government asserts subterfuge,—illegal purpose liveried in legal forms to give color of right to illegal practices.

The charge challenges consideration of the relation between that which the manufacturers engaged to do and the protection of the exclusive right attached to the invention. Upon such consideration how far the licenses transcend such right and violate the Sherman law we can then determine. And we shall keep in mind and apply the principle expressed in *E. Bement & Sons v. National Harrow Co.*, 186 U. S. 70, 92,

46 L. ed. 1058, 1069, that the Sherman law "clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act, no doubt, was never contemplated by its framers."

In our inquiry we shall accept *arguendo* the statement of defendants of their inducement and purpose. We say "*arguendo*," because the asserted inducement and purpose are denied by the government, it contending, as we have seen, that the Arrott patent was but a pretense, and that the agreements were put in the form of licenses of it to at once accomplish and palliate evasions of the law. The fact being in controversy, we place our consideration and decision on other elements. In other words, we will consider the case from the standpoint of defendants' view of the situation, with comments as we proceed as to what they did to meet it, and how far what they did accorded with or transgressed the law.

The contention of the defendants, then, is that the Standard Company's position and power as owner of the patent, and Wayman's were identical. What it could have done, it is contended, he could do, and its relation to the trade and the relation of other manufacturers to the trade clearly demonstrate, it is further contended, that as that company could have made the contracts, Wayman could do so.

To support the contention defendants represent the Standard as the dominant (it produced 50 per cent of the articles) and the only honest manufacturer, pointing out to other manufacturers the worthlessness of their output, they not having the Arrott patent; also the dishonesty of their output, they putting out "seconds," the inferiority of which was "discernible only by experts,"—thereby defrauding the public, "discrediting the ware, and demoralizing the market and business." To avert these evil results, it is represented that the Standard was willing to forego the advantages which its ownership of the Arrott patent gave it, and confer them upon the other manufacturers. But upon terms. "First and foremost" it was to be agreed that no "seconds" should be marketed. In the second place, a standard price must be agreed to so

that henceforth rivalry should be "in the quality of the ware turned out at a uniform price, or in any other collateral inducement to the purchaser" that would not "affect the quality of the ware." Wayman's agency and office, it is represented, was that of "watching all parties and insuring their fidelity to the agreement by the payment of a royalty for the use of the invention." And this it is said, is "all there is, in substance or principle, to the case at bar, except that Mr. Wayman, instead of the Standard Company, was the originator of the scheme, and that he persuaded his codefendants to enter into it."

But the scheme has other features and effects which counsel overlook or ignore. It is immediately open to the criticism that its parts have no natural or necessary relation. What relation has the fixing of a price of the ware to the production of "seconds"? If the articles were made perfect, their price in compensation of them and by unfettered competition would adjust itself. To say otherwise would be in defiance of the examples of the trading and industrial world. Nor was a combination of manufacturers necessary to the perfection of manufacture and to rivalry in its quality. And it may be asked if such perfection and its protecting influence against deception and the ruinous depression of prices were so desirable and potent as it is contended that they were, why were they not extended to "baths," the most important of the articles in the trade? It is not an adequate answer to say that there was a time guaranty of them, even though it was given to all of them, as it was not. The justification of defendants is based not on the responsibility of manufacturers, but on the integrity of the articles assured by the use of the Arrott device.

It is the foundation of defendants' argument that to make the use of that device universal was the prompting of Wayman's energies to unite the manufacturers and to remove the evils which beset the trade and which were "discrediting the ware and demoralizing the market and business." It was the representation of the advantage, we are told, of such results, that broke down the resolution of the Standard Company not to share the use of the device with other manufacturers. But granting that there was provision or security against the

production of "seconds" in all of the articles, it seems from what we have said above that all of the substantial good which is asserted to have been the object of the agreements could have been attained by a simple sale of the right to use the Arrott patent, conceding to it the dominant effect which is attributed to it. Nor is the justification of defendants made more adequate by the representation that "Wayman's motive was to make money for himself, not as a manufacturer, but as the owner of the patent, receiving royalties from those whom he licensed to use his patented invention." Wayman testified to another motive. By fixing prices "he hoped," he said, "as one of the features of the license agreements, to enable the companies to abolish ruinous competition," and to get "a revenue for each of the companies to enable them to make a reasonable profit."

But motives and inducements may not be easily estimated, and we will pass to a consideration of the agreements. On March 30, 1910, the Manufacturers' Association passed a resolution and a committee of five was constituted, to be known as the price and schedule committee, to which the license agreements and resale agreements should be referred. This committee was to interview the various manufacturers and obtain their consent to the agreements which were to become effective "when the consent of 83 per cent of the production" was had. The signatory manufacturers agreed to "give their prompt co-operation to the matter in question."

At the same time the following resolution was passed:

"Whereas, a proposition is pending for a license agreement and a resale price for the benefit of the jobbing trade, and

"Whereas, long-term contracts are a menace to said proposition,

"We, the undersigned, manufacturers of enameled ware, hereby agree to take no orders for delivery beyond May 31, 1910.

"This agreement is not binding upon the signers unless all members of the Enameled Ware Manufacturers' Association are parties thereto and append their signatures.

"The within is agreed to."

At the same meeting a memorandum of agreement was proposed which was to be executed with Wayman as licensor of

various patents covering pneumatic dredgers. The agreement covered selling schedules of the ware and provided for the royalties to be paid; the selling price to the jobbers to be established by the licensor through a committee appointed by the various manufacturers. It provided penalties for the violation of the price regulations, and preferential discounts (discounts allowed to certain manufacturers from the selling prices). Such discounts were to be allowed on sales to jobbers only.

Such details as might "be necessary for the perfection of the arrangement" were reserved for the next meeting of manufacturers. After this meeting a circular letter was sent by Wayman to all manufacturers, apprising them of what had transpired, the attention that had been given the subject, and informing them that "the final license agreement papers" would be executed at the next meeting, to be held in May.

The license agreement was subsequently executed. It granted to the licensee the right to use in the manufacture of enameled ware the Arrott patent, also a patent to E. Dithridge for a pneumatic sieve and a patent to William Lindsay for an "enameling powder distributor." It released the claims for past infringement so long as the licensees operated under the license. It fixed royalties of \$5 per day for each furnace, subject to a diminution of like amount for furnaces shut down for more than six consecutive working days. It fixed preferential discounts from the regular selling prices, confining them only to sales by the manufacturers to jobbers. And it was provided that no goods manufactured under the license should be sold unless they bore a registered label (except where otherwise specified) owned by the licensee, and in addition thereto a license tag or label approved by the licensor, placed in a visible position thereon.

The provision for prices was as follows:

"The licensor agrees that he will employ a commission of six persons, of which he is to be one, and to act as chairman thereof, five of whom shall be designated by a majority of the parties holding licenses similar to this license, which commission shall have supervision of all the relations and transactions between the parties hereto under this agreement; but it is understood that where a member of said commission, or his company, shall be directly interested in any question of a

violation of the license to be decided by the said commission, said member shall be disqualified and a temporary member shall be appointed in his place by the remaining members of the commission.

"All terms and conditions relative to prices and discounts now established by the licensor and set forth in the annexed schedules and made a part hereof shall remain in force and effect until other terms, conditions, and preferential discounts are substituted therefor by the licensor, which substitution can only be made by him with the approval of a majority of the members of the commission, hereinbefore prescribed. Notice of such changes and substitutions shall be given from time to time in writing by the licensor to the licensees. The licensee covenants to adhere to and maintain such terms, conditions, regulations, prices, and preferential discounts as may be established by the licensor from time to time, *and the licensee further agrees to sell no 'seconds' or 'B's' covered by schedules 4, 4½, 5, and 6.*" (Italics ours.)

The restrictions as to prices at which the goods were to be sold did not apply to those sold and exported to foreign countries. Such sales were required, however, to be proved to the licensor.

There was a provision for the return of 80 per cent of the royalties paid if the agreement should be complied with. These royalties, called in the agreement "royalty rebates," were forfeited if the provisions of the agreement should be violated in any particular.

The foregoing constitute the essential provisions of the manufacturer's agreements, and it will be observed what little space is given to "seconds," though it is asserted in the argument, as we have seen, that to get rid of the evils of their production and sale was the chief impulse to the agreements. The covenant as to "seconds" was expressed by the words which we have italicized in the provision relating to prices and discounts, quoted above. The schedules referred to are found in the paragraph providing for preferential discounts, and cover all articles but baths, these being described in schedules 1, 2, and 3.

There was also a jobber's license agreement that bore at the top the note that it "must be executed by the purchaser

in order to purchase licensed sanitary enameled ware." It conveyed to the jobber the right to buy and sell such ware, provided for certain discounts and details as to shipments and deliveries, and that the sales were to be made "by the purchasers at prices to be established and prevailing in the various zones into which the goods were shipped, regardless of the point of purchase." There was a provision for the payment of the purchase price at certain rebate periods if the agreement should be complied with. The resale prices as established from time to time were required to be maintained by all jobbers and dealers, and sales could not be made from one jobber to another for any better prices than "established by the sheets," and the purchaser agreed to "observe and strictly maintain . . . the selling prices as they are set forth in the schedules, and observe and adhere to the rules and regulations as embodied in the price sheets," or embodied in price sheets which might be issued by or under the authority of the licensor. Articles might be added to or removed from the schedules at any time. The purchaser also agreed during the life of the contract not to purchase, sell, advertise, or solicit orders for, or in any way handle or deal in, sanitary enameled ironware of any manufacturer not licensed under the letters patent enumerated in the agreement, except with the express written permission of the licensor. A breach of any of the conditions subjected the contract and all unfilled orders to cancellation, the forfeiture of rebates, and the power to obtain the ware manufactured under the letters patent from any of the licensed manufacturers. The purchaser further agreed not to sell any goods on hand manufactured in accordance with the patents, irrespective of by whom manufactured, except in accordance with the prices, conditions, and regulations of sale established by the licensor.

The price list contained a notice to the jobbers' salesmen that the agreements executed by their companies required them to resell the various licensed products at no better prices, terms, or other regulations than therein established. And further, as changes, additions, and eliminations occurred, new sheets would be issued promptly.

These are the main outlines of the agreements, and, as emphasizing them, Wayman directed the manufacturers at the

time they sent out the jobbers' agreements to also send with them a letter containing the following: "It is necessary for you [the jobbers] to execute these contracts before we [the manufacturers] can sell you licensed sanitary enameled ware." This provision was enforced, as indicated by letters in the record. It was also the condition expressed by Wayman in his correspondence with other manufacturers whom he tried to induce to accept licenses and become parties to the agreements. In a letter to a jobber Wayman expressed the hope that the jobber could see his way clear to execute the agreement, as it covered "a matter entirely for the jobbers' benefit." He further stated: "The Cedar Rapids Pump Company of your city have executed the agreement, and I hope you will co-operate immediately with your local competitors, which will be much more advantageous than a continuous cut market."

In this statement certain things are prominent. Before the agreements the manufacturers of enameled ware were independent and competitive. By the agreements they were combined, subjected themselves to certain rules and regulations, among others, not to sell their product to the jobbers except at a price fixed not by trade and competitive conditions, but by the decision of the committee of six of their number, and zones of sales were created. And the jobbers were brought into the combination and made its subjection complete and its purpose successful. Unless they entered the combination they could obtain no enameled ware from any manufacturer who was in the combination, and the condition of entry was not to resell to plumbers except at the prices determined by the manufacturers. The trade was, therefore, practically controlled from producer to consumer, and the potency of the scheme was established by the co-operation of 85 per cent of the manufacturers, and their fidelity to it was secured not only by trade advantages, but by what was practically a pecuniary penalty, not inaptly termed in the argument, "cash bail." The royalty for each furnace was \$5, 80 per cent of which was to be returned if the agreement was faithfully observed; it was to be "forfeited as a penalty" if the agreement was violated. And for faithful observance of their engagements the jobbers, too, were entitled to rebates from their

purchases. It is testified that 90 per cent of the jobbers in number and more than 90 per cent in purchasing power joined the combination.

The agreements clearly, therefore, transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it. They passed to the purpose and accomplished a restraint of trade condemned by the Sherman law. It had, therefore, a purpose and accomplished a result not shown in the Bement Case. There was a contention in that case that the contract of the National Harrow Company with Bement & Sons was part of a contract and combination with many other companies and constituted a violation of the Sherman law, but the fact was not established, and the case was treated as one between the particular parties, the one granting and the other receiving a right to use a patented article with conditions suitable to protect such use and secure its benefits. And there is nothing in *Henry v. A. B. Dick Co.* 224 U. S. 1, 56 L. ed. 645, which contravenes the views herein expressed.

The agreements in the case at bar combined the manufacturers and jobbers of enameled ware very much to the same purpose and results as the association of manufacturers and dealers in tiles combined them in *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. ed. 608, which combination was condemned by this court as offending the Sherman law. The added element of the patent in the case at bar cannot confer immunity from a like condemnation, for the reasons we have stated. And this we say without entering into the consideration of the distinction of rights for which the government contends between a patented article and a patented tool used in the manufacture of an unpatented article. Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights a universal license against positive prohibitions. The Sherman law is a limitation of rights,—rights which may be pushed to evil consequences, and therefore restrained.

This court has had occasion in a number of cases to declare its principle. Two of those cases we have cited. The others it is not necessary to review or to quote from except to say that, in the very latest of them, the comprehensive and thorough

character of the law is demonstrated and its sufficiency to prevent evasions of its policy "by resort to any disguise or subterfuge of form," or the escape of its prohibitions "by any indirection." *United States v. American Tobacco Co.* 221 U. S. 106, 181, 55 L. ed. 663, 694. Nor can they be evaded by good motives. The law is its own measure of right and wrong, of what it permits or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and, it may be, of some good results. *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007; *Armour Packing Co. v. United States*, 209 U. S. 56, 62, 52 L. ed. 681, 684.

The Colwell Lead Company asserts the legality of the license agreements as the other defendants do, and, besides, urges that it was not engaged in interstate commerce, but that it only sold to plumbers, and that none of the price restrictions was applicable to it, nor was it at any time in any relations whatsoever with the other defendants. It asserts that it was itself a jobber, and therefore had no occasion to deal with jobbers, and that it was not present nor represented at any of the meetings preceding the license agreements.

It does appear, however, that the company was a member of the association of manufacturers,—an association which, we have seen, passed the first resolution in regard to the license agreement,—and the president of the company, when addressed on the subject of the agreement, expressed an appreciation of it provided all manufacturers should "sign up." He, however, reserved final judgment until he could go over the matter in detail with Wayman, who had addressed him, and declared that he would "be greatly influenced by what other manufacturers do."

There is a letter in the record, about which, however, there is some dispute, purporting to have been written by the president of the company to Wayman, in which the latter's interpretation of a previous letter was said to be "entirely correct," and which contained the following: "We will not require any preferentials below the lowest price made by the Standard Sanitary Manufacturing Company." There can be little doubt of the genuineness of the letter, and it is certain that the company asserted on the 25th of May, 1910. Its license, how-

ever, was modified in order that it might meet local competition in New York, its business being, it is contended, mostly local.

It appears from the testimony that the company was a manufacturer and a jobber, manufacturing about one half of what it sold. As a jobber it bought goods from other manufacturers, but it denies there was an agreement as to prices with such manufacturers.

The testimony as to the state or interstate character of its business is that it manufactures at Elizabeth, New Jersey, and buys also from other manufacturers and jobbers. It ships from there to its warehouses in New York, Worcester, Massachusetts, and Brooklyn. The trade of its Worcester branch covers about 200 miles around Worcester, its efforts being to localize its business. It is doubtful, it is testified, if the trade goes beyond Massachusetts, the trade there being circumscribed. Sales in Connecticut are made through the New York office from the warerooms.

It is manifest that the Colwell Company was a party to the combination and was also engaged in interstate commerce. The fact that its trade was less general than that of the other manufacturers and jobbers does not take from it the character of an interstate trader. The fact that it was restricted in less degree than the other jobbers, given a certain freedom of competition to meet local conditions in New York, diminishes only the degree of culpability, but does not entirely remove it. Indeed, it may be said that such freedom does not even diminish culpability. It is a concession which may be made a means of crushing competition where it is most formidable.

Error is assigned on the action of the circuit court in not granting a motion made by defendants for an enlargement of time to take testimony, on the ground that they had been prevented, by the action of the government in instituting criminal proceedings, from properly presenting their defense.

The question arose upon the action of witnesses who were subpoenaed and called by the Colwell Lead Company, they being officers of some of the other manufacturers. The government apprehending, and as it now contends, that the witnesses were called to give them immunity from a criminal prosecution which was then pending in Michigan, notified

them that if they testified they would do so at their peril, as immunity could only be claimed by witnesses for the government. The witnesses thereupon, upon the advice of counsel, refused to testify, leaving, as it is contended, the Colwell Company particularly, and the other defendants as well, without the evidence such witnesses could have given, and which, it is said, they did give subsequently in the criminal trial.

Whether the testimony, if given, would have conferred immunity, we are not called upon to determine. The only question is as to the extent of the court's discretion in such circumstances. The Sherman act provides for a criminal proceeding to punish violations, and suits in equity to restrain such violations, and the suits may be brought simultaneously or successively. The order of their bringing must depend upon the government; the dependence of their trials cannot be fixed by a hard-and-fast rule, or made imperatively to turn upon the character of the suit. Circumstances may determine and are for the consideration of the court. An imperative rule that the civil suit must await the trial of the criminal action might result in injustice or take from the statute a great deal of its power. Besides a suit by the government, there may be an action for damages by a "person injured by reason of anything forbidden by the act." Must it also wait? Indeed, the reasons urged for the rule, if logically extended, would compel the postponement of the enforcement of the civil remedies until the exhaustion of criminal prosecutions or their expiration by lapse of time. Until either event occurs, the danger of incrimination cannot be said to have passed. It is manifest, therefore, that the most favorable view which can be taken of the rights of defendants in such situation is that they depend upon the discretion of the court in the particular case. We find no abuse of such discretion in the case at bar.

Decree affirmed.

NASH v. UNITED STATES

(Supreme Court of United States, 1913. 229 U. S. 373.)

MR. JUSTICE HOLMES³⁵ delivered the opinion of the court:

This is an indictment in two counts,—the first for a conspiracy in restraint of trade, the second for a conspiracy to monopolize trade, contrary to the act of July 2, 1890, chap. 647, 26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3200, commonly known as the Sherman act. Originally there was a third count for monopolizing, but it was held bad on demurrer and was struck out.

The allegations of fact in the two counts are alike. Summed up in narrative form they are as follows: The American Naval Stores Company, a West Virginia corporation having its principal office in Savannah and branch offices in New York, Philadelphia, Chicago, etc., was engaged in buying, selling, shipping, and exporting spirits of turpentine in and from Southern states to other states and abroad. Nash was the president; Shotter, chairman of the board of directors; Myers, vice president; Boardman, treasurer; DeLoach, secretary; and Moller, manager of the Jacksonville, Florida, branch. The National Transportation & Terminal Company, a New Jersey corporation, had warehouses and terminals for handling spirits of turpentine and naval stores at Fernandina, and other places named, in Florida, Alabama, Mississippi, etc., was engaged in storing such turpentine and rosin and issuing warehouse receipts for the same. Myers was the president, DeLoach the secretary, and Moller manager of the Jacksonville branch. On May 1, 1907, it is alleged, these corporations and individuals conspired to restrain commerce in the articles named, among the states and with foreign nations,—the restraint to be effected in the following ways, among others: (1) by bidding down turpentine and rosin so that competitors could sell them only at ruinous prices; (2) by causing naval stores receipts that naturally would go to one port, to go to another; (3) by purchasing thereafter a large part of "its" supplies at ports known as closed ports, and, with intent to depress the market, refraining from purchasing any appreciable part at Savannah,

³⁵—Only the opinion of the court is given.

the primary market in the United States for naval stores, where purchases would tend to strengthen prices, the defendants taking the receipts at the closed ports named on a basis of the market at Savannah; (4) by coercing factors and brokers into contracts with the defendants for the storage and purchase of their receipts, and refusing to purchase from such factors and brokers unless such contracts were entered into; (5) by circulating false statements as to naval stores production and stocks on hand; (6) by issuing fraudulent warehouse receipts; (7) by fraudulently grading, regrading, and raising grades of rosins, and falsely gauging spirits of turpentine; (8) by attempting to bribe employees of competitors so as to obtain information concerning their business and stocks; (9) by inducing consumers, by payments and threats of boycotts, to postpone dates of delivery of contract supplies, and thus enabling defendants to postpone purchasing when to purchase would tend to strengthen the market; (10) by making tentative offers of large amounts of naval stores to depress the market, accepting contracts only for small amounts, and purchasing when the market had been depressed by the offers; (11) by selling far below cost in order to compel competitors to meet prices ruinous to everybody; (12) by fixing the price of turpentine below the cost of production,—all the foregoing being for the purpose of driving competitors out of business and restraining foreign trade, or, in the second count, of doing the same and monopolizing the trade.

The two counts before us were demurred to on the grounds that the statute was so vague as to be inoperative on its criminal side; that neither of the counts alleged any overt act; that the contemplated acts and things would not have constituted an offense if they had been done, and that the same acts, etc., were too vaguely charged. The demurrer was overruled and this action of the court raises the important questions of the case. We will deal with them before passing to matters of detail.

The objection to the criminal operation of the statute is thought to be warranted by *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912 D, 734, and *United States v. American Tobacco Co.* 221 U. S. 106, 55 L. ed. 663. Those cases may be taken to have

established that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade. 221 U. S. 179. And thereupon it is said that the crime thus defined by the statute contains in its definition an element of degree as to which estimates may differ, with the result that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men. The kindred proposition that "the criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty," is cited from the late Mr. Justice BREWER, sitting in the circuit court. *Tozer v. United States*, 4 Inters. Com. Rep. 245, 52 Fed. 917, 919.

But, apart from the common law as to the restraint of trade thus taken up by the statute, the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. "An act causing death may be murder, manslaughter, or misadventure, according to the degree of danger attending it" by common experience in the circumstances known to the actor. "The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw." *Com. v. Pierce*, 138 Mass. 165, 178, 52 Am. Rep. 264, 5 Am. Crim. Rep. 391; *Com. v. Chance*, 174 Mass. 245, 252, 75 Am. St. Rep. 306. "The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct." 1 East, P. C. 262. If a man should kill another by driving an automobile furiously into a crowd, he might be convicted of murder, however little he expected the result. See *Reg. v. Desmond*, and other illustrations in Stephen's *Dig. Crim. Law*, art. 223, 1st ed., p. 146. If he did no more than drive negligently through a street, he might get off with manslaughter or less. *Reg. v. Swindall*, 2 Carr. & K. 230, 2 Cox, C. C. 141; *Rex v. Burton*, 1 Strange, 481. And in the last case he might

be held although he himself thought that he was acting as a prudent man should. See the *Germanic Oceanic Steam Nav. Co. v. Aitken*, 196 U. S. 589, 596, 49 L. ed. 610, 613. But without further argument, the case is very nearly disposed of by *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 109, 53 L. ed. 417, 429, where Mr. Justice Brewer's decision and other similar ones were cited in vain. We are of opinion that there is no constitutional difficulty in the way of enforcing the criminal part of the act.

Coming next to the objection that no overt act is laid, the answer is that the Sherman act punishes the conspiracies at which it is aimed on the common-law footing,—that is to say, it does not make the doing of any act other than the act of conspiring a condition of liability. The decisions as to the relations of a subsequent overt act to crimes under Rev. Stat. § 5440, U. S. Comp. Stat. 1901, p. 3676, in *Hyde v. United States*, 225 U. S. 347, 56 L. ed. 1114, and *Brown v. Elliott*, 225 U. S. 392, 56 L. ed. 1136, have no bearing upon a statute that does not contain the requirement found in that section. As we can see no reason for reading into the Sherman act more than we find there, we think it unnecessary to offer arguments against doing so.

As to the suggestion that the matters alleged to have been contemplated would not have constituted an offense if they had been done, it is enough to say that some of them conceivably might have been adequate to accomplish the result, and that the intent alleged would convert what on their face might be no more than ordinary acts of competition or the small dishonesties of trade into a conspiracy of wider scope, as has been explained more than once. *Swift & Co. v. United States*, 196 U. S. 375, 396, 49 L. ed. 518, 524; *Loewe v. Lawler*, 208 U. S. 274, 299, 52 L. ed. 488, 500, 13 Ann. Cas. 815. Of course, this fact calls for conscience and circumspection in prosecuting officers, lest by the unfounded charge of a wider purpose than the acts necessarily import they convert what at most would be small local offenses into crimes under the statutes of the United States. But we cannot say, as was the case in *United States v. Winslow*, 227 U. S. 202, 218, 57 L. ed.—that no intent could convert the proposed conduct into such a crime.

Finally, we cannot pronounce the counts before us bad for

uncertainty. On demand of the defendants a bill of particulars was furnished, and there is no reason to fear that injustice was done in that respect. There was no need to allege or prove that the conspirators themselves were all traders. *Loewe v. Lawlor*, 208 U. S. 274, 301, 52 L. ed. 488, 502, 13 Ann. Cas. 815. The first count, at least, was well enough.

After the demurrer was overruled the defendants pleaded not guilty, and there was a trial and a verdict finding that Nash, Shotter, Myers, Moller, and Boardman were guilty and DeLoach not guilty, but saying nothing as to the corporations. Numerous exceptions were taken, but as writs of certiorari are not granted to bring up the ordinary incidents of a criminal trial, we shall say little more than is necessary to dispose of the case. It was argued with a good deal of force that the only evidence of the alleged conspiracy was certain acts done on behalf of the corporations; that the only ground for charging the defendants who were found guilty was their relation to the companies and their being presumably cognizant of and more or less responsible for the corporate acts; that if those acts tended to prove a conspiracy, they proved that the corporations, more clearly than anyone else, were parties to it, and therefore that a verdict that was silent as to them ought to be set aside. We need not consider the effect of Rev. Stat. § 1036, U. S. Comp. Stat. 1901, p. 723, on whether on the evidence it was possible to find the defendants guilty by reason of an intent not shown to be shared by the corporations, as the judgment must be reversed for another reason.

The reason is this. The court in its instructions told the jury to "consider the evidence of the means which it is insisted by the prosecution tends to show a conspiracy," and said: "You will consider carefully all the means which the indictment charges;" and "it is sufficient if it be shown beyond a reasonable doubt that some of these means charged were a part of the common scheme, design, or understanding or conspiracy by two or more of the defendants, and that these same means were of themselves sufficient to cause an essential obstruction and restraint of the free and untrammelled flow of trade and commerce between the states and foreign nations." Thus, while it may be admitted that not all the means alleged need be proved, the charge invited the jury to consider all,

and permitted a verdict upon any one of them. The fifth, sixth, and eighth statements of means to be employed were withdrawn from the jury, but the jury's attention seems not to have been called to the fact that some of the charges were abandoned, in the connection in which it was important. Furthermore, one of the means alleged was the false raising of grades and false gauging. Taken with other evidence, if it was shown to be systematic, it would have had a tendency to show the scheme alleged. But taken by itself, as the jury might have taken it under the instructions, it showed only cheating, and could not warrant a finding of the conspiracy with which the defendants were charged. It is unnecessary to consider whether there was any evidence sufficient to warrant a conviction upon some of the other means alleged, for instance, the first, as the absence of such evidence only would add another reason for holding the instructions wrong upon a vital point.

Judgment reversed.

Mr. Justice PITNEY dissents.

EASTERN STATES RETAIL LUMBER DEALERS' ASSN.
v. UNITED STATES

(Supreme Court of United States, 1914. 234 U. S. 600.)

MR. JUSTICE DAY ³⁶ delivered the opinion of the court:

These are appeals from a decree of the district court of the United States for the southern district of New York in an action brought by the United States under the Sherman anti-trust act (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), having for its object an injunction against certain alleged combinations of retail lumber dealers, which, it was averred, had entered into a conspiracy to prevent wholesale dealers from selling directly to consumers of lumber. The defendants are various lumber associations composed largely of retail lumber dealers in New York, New Jersey, Pennsylvania, Connecticut, Massachusetts, Rhode Island, Maryland,

³⁶—Only the opinion of the court is given.

and the District of Columbia, and the officers and directors of the associations. The record is very voluminous, but the facts essential to a consideration of the decree of the district court are in comparatively narrow compass. While the record also concerns practices which are said to have been abandoned, the decree entered, declaring the defendants named to be in a combination or conspiracy to restrict and restrain competition, depends solely upon the method adopted and being used by the defendants in the distribution of the information contained in a certain document known as the "Official Report," the form of which, set forth in the decree, is as follows:

Official Report.

(Name of the Particular Association circulating it.)
Statement to Members (with the Date).

You are reminded that it is because you are members of our Association and have an interest in common with your fellow members in the information contained in this statement, that they communicate it to you; and that they communicate to you in strictest confidence, and with the understanding that you are to receive it and treat it in the same way.

The following are reported as having solicited, quoted, or as having sold direct to the consumers:

(Here follows a list of the names and addresses of various wholesale dealers.)

Members upon learning of any instance of persons soliciting, quoting, or selling direct to consumers, should at once report same, and in so doing should, if possible, supply the following information:

The number and initials of car.

The name of consumer to whom the car is consigned.

The initials or name of shipper.

The date of arrival of car.

The place of delivery.

The point of origin;

and the defendants were enjoined from combining, conspiring, or agreeing together to distribute, and from distributing, to members of the associations named or any other person or per-

sons, any information showing soliciting, quotations, or sales and shipments of lumber and lumber products from manufacturers and wholesalers to consumers of or dealers in lumber, and from the preparation and distribution of the lists above described as the "Official Report," or the use of a similar device.

The record discloses that the defendant associations are constituted largely of retail lumber dealers, each of whom has the natural desire to control his local trade, which the retailers contend has been unduly interfered with by the wholesalers in selling to consumers within the local territory in such wise as to conflict with what they regard as a strictly local trade, and it appears that the defendant associations have for their object, among other things, the adoption of ways and means to protect such trade and to prevent the wholesale dealers from intruding therein. The particular thing which this case concerns in the retailers' efforts to promote the end in view is the attempt in the matter shown, by the circulation of the reports in question, to keep the wholesalers from selling directly to the local trade. The trade of the wholesalers involved covers a number of states, and there is no question but that the supplying of lumber to the large numbers of retailers in these associations in different states is interstate trade, and that if the practices are illegal within the Sherman act they may be reached by this proceeding. *Swift & Co. v. United States*, 196 U. S. 375, 49 L. ed. 518; *Loewe v. Lawlor*, 208 U. S. 274, 300, 52 L. ed. 488, 501, 13 Ann. Cas. 815.

The record discloses a systematic circulation among the members of the defendant associations of the official report above quoted. The method of operation as stated by the learned counsel for the appellants is thus summarized in his brief:

"The names on this list are obtained and placed thereon as the result of complaints made by individual retailers. When an individual member of a retail association learns of a sale by a wholesaler to one of the customers of the retailer he may complain in writing to the secretary of his association, whose duty it is thereupon to ascertain the facts by correspondence with the wholesaler in question and such other means as may seem proper. Should the report or complaint be without

proper foundation, or should the secretary become satisfied that the matter is a trifling one, or the result of inadvertence, the incident usually terminates at this point; but should the complaint appear to be serious and well founded, the case is submitted to the board of directors of the retail association at its next meeting, and should the board be satisfied that the wholesaler is generally making a practice of selling to consumers or customers of the retail trade, the secretary is directed to report the name of such wholesaler for the official list. Thereupon the secretary sends the name to Mr. Cray of New York, who adds it upon the next report to the names of those already thereupon. Each report contains the names of all wholesalers who have been reported from the very beginning as selling to consumers, and whose names have not been removed for cause. The reports or lists after being printed in New York are distributed amongst the secretaries of the defendant associations; those for each association being marked with its name, and in that way only being distinguished from those sent to the other associations. The secretary of each association then distributes the lists to his members. Should any wholesaler desire to have his name removed from the list he can have it done upon satisfactory assurance to the local secretary that he is no longer selling in competition with the retailers. In practice the greatest care is taken to make the list accurate, and as a matter of fact, it only contains the names of such wholesalers as are absolutely committed to the practice of competing with retailers for the custom of builders and contractors."

The reading of the official report shows that it is intended to give confidential information to the members of the associations of the names of wholesalers reported as soliciting or selling directly to consumers, members upon learning of any such instances being called upon to promptly report the same, supplying detailed information as to the particulars of the transaction. When viewed in the light of the history of these associations and the conflict in which they were engaged to keep the retail trade to themselves and to prevent wholesalers from interfering with what they regarded as their rights in such trade, there can be but one purpose in giving the information in this form to the members of the retail associations

of the names of all wholesalers who, by their attempt to invade the exclusive territory of the retailers, as they regard it, have been guilty of unfair competitive trade. These lists were quite commonly spoken of as blacklists, and when the attention of a retailer was brought to the name of a wholesaler who had acted in this wise it was with the evident purpose that he should know of such conduct and act accordingly. True it is that there is no agreement among the retailers to refrain from dealing with listed wholesalers, nor is there any penalty annexed for the failure so to do; but he is blind indeed who does not see the purpose in the predetermined and periodical circulation of this report to put the ban upon wholesale dealers whose names appear in the list of unfair dealers trying by methods obnoxious to the retail dealers to supply the trade which they regard as their own. Indeed, this purpose is practically conceded in the brief of the learned counsel for the appellants:

“It was and is conceded by defendants, and the court below found, that the circulation of this information would have a natural tendency to cause retailers receiving these reports to withhold patronage from listed concerns. That was, of course, the very object of the defendants in circulating them.”

In other words, the circulation of such information among the hundreds of retailers as to the alleged delinquency of a wholesaler with one of their number had and was intended to have the natural effect of causing such retailers to withhold their patronage from the concern listed.

The Sherman act has been so frequently and recently before this court as to require no extended discussion now. *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912 D, 734; *United States v. American Tobacco Co.* 221 U. S. 106, 55 L. ed. 663; *United States v. Terminal R. Asso.* 224 U. S. 383, 56 L. ed. 810; *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 57 L. ed. 107; *United States v. Union P. R. Co.* 226 U. S. 61, 57 L. ed. 124; *United States v. Reading Co.* 226 U. S. 324, 57 L. ed. 243; *United States v. Patten*, 226 U. S. 525, 57 L. ed. 333, 44 L. R. A. (N. S.) 325; *Nash v. United States*, 229 U. S. 373, 57 L. ed. 1232; *Straus v. American Pub. Asso.* 231 U. S. 222, 58 L. ed. —. It broadly condemns all combinations and conspiracies which restrain the

free and natural flow of trade in the channels of interstate commerce. It is true that this court held in the *Standard Oil and Tobacco Cases*, *supra*, and in the subsequent cases following them, that in its proper construction the act was not intended to reach normal and usual contracts incident to lawful purposes and intended to further legitimate trade, and summarizing the meaning of the act in the *Tobacco Case*, this court said (221 U. S. 179):

"Applying the rule of reason to the construction of the statute, it was held in the *Standard Oil Case* that as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the anti-trust act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition, or unduly obstructing the due course of trade, or which, either because of their inherent nature or effect, or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance."

The same principle was affirmed in *Nash v. United States*, 229 U. S. 373, 57 L. ed. 1232. The court in the *Standard Oil Case* construed the act as intended to reach only combinations unduly restrictive of the flow of commerce, or unduly restrictive of competition, and, illustrating what were such undue or unreasonable combinations, it classed as illegal (p. 58) "all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act, or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but, on the contrary, were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy." And in *Loewe v. Lawlor*, *supra*, this court held that a combination to boycott the hats of a manufacturer and deter dealers from buying them in order to coerce the manufacturer

to a particular course of action with reference to labor organizations, the effect of the combination being to compel third parties and strangers not to engage in a course of trade except upon conditions which the combination imposed, was within the Sherman act. In *Gompers v. Buck's Stove & Range Co.* 221 U. S. 418, 55 L. ed. 797, 34 L. R. A. (N. S.) 874, after citing *Loewe v. Lawlor*, supra, this court said (p. 438):

"But the principle announced by the court was general. It [the Sherman act] covered any illegal means by which interstate commerce is restrained, whether by unlawful combinations of capital, or unlawful combinations of labor; and we think also whether the restraint be occasioned by unlawful contracts, trusts, pooling arrangements, blacklists, boycotts, coercion, threats, intimidation, and whether these be made effective, in whole or in part, by acts, words, or printed matter."

And see *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. ed. 608.

These principles are applicable to this situation. Here are wholesale dealers in large number engaged in interstate trade upon whom it is proposed to impose as a condition of carrying on that trade that they shall not sell in such manner that a local retail dealer may regard such sale as an infringement of his exclusive right to trade, upon pain of being reported as an unfair dealer to a large number of other retail dealers associated with the offended dealer, the purpose being to keep the wholesaler from dealing not only with the particular dealer who reports him, but with all others of the class who may be informed of his delinquency. "Section 1 of the act . . . is not confined to voluntary restraints, as where persons engaged in interstate trade or commerce agree to suppress competition among themselves, but includes as well involuntary restraints, as where persons not so engaged conspire to compel action by others, or to create artificial conditions, which necessarily impede or burden the due course of such trade or commerce, or restrict the common liberty to engage therein." *United States v. Patten*, 226 U. S. 541, 57 L. ed. 341, 44 L. R. A. (N. S.) 325. This record abounds in instances where the offending dealer was thus reported, the hoped-for effect, unless he discontinued the offending practice, realized, and his trade directly and appreciably impaired.

But it is said that in order to show a combination or conspiracy within the Sherman act some agreement must be shown under which the concerted action is taken. It is elementary, however, that conspiracies are seldom capable of proof by direct testimony, and may be inferred from the things actually done; and when, in this case, by concerted action the names of wholesalers who were reported as having made sales to consumers were periodically reported to the other members of the associations, the conspiracy to accomplish that which was the natural consequence of such action may be readily inferred.

The circulation of these reports not only tends to directly restrain the freedom of commerce by preventing the listed dealers from entering into competition with retailers, as was held by the district court, but it directly tends to prevent other retailers who have no personal grievance against him, and with whom he might trade, from so doing, they being deterred solely because of the influence of the report circulated among the members of the associations. In other words, the trade of the wholesaler with strangers was directly affected, not because of any supposed wrong which he had done to them, but because of the grievance of a member of one of the associations, who had reported a wrong to himself, which grievance, when brought to the attention of others, it was hoped would deter them from dealing with the offending party. This practice takes the case out of those normal and usual agreements in aid of trade and commerce which may be found not to be within the act, and puts it within the prohibited class of undue and unreasonable restraints, such as was the particular subject of condemnation in *Loewe v. Lawlor*, 208 U. S. 274, 300, 52 L. ed. 488, 501, 13 Ann. Cas. 815.

The argument that the course pursued is necessary to the protection of the retail trade and promotive of the public welfare in providing retail facilities is answered by the fact that Congress, with the right to control the field of interstate commerce, has so legislated as to prevent resort to practices which unduly restrain competition or unduly obstruct the free flow of such commerce, and private choice of means must yield to the national authority thus exerted. *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 241, 242, 44 L. ed. 136, 147, 148.

Anderson v. United States, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50, is cited and relied upon by the appellants. In that case this court sustained, as against an attack under the Sherman law, the legality of an association called the Traders' Live Stock Exchange in Kansas City. An agreement among purchasers of cattle for the purpose of regulating and controlling the local business among themselves had been entered into, and one of the rules provided that the members of the exchange should not deal with any other yard trader unless he was a member of such exchange. It was said (p. 613):

"There is no evidence that these defendants have in any manner other than by the rules above mentioned hindered or impeded others in shipping, trading, or selling their stock, or that they have in any way interfered with the freedom of access to the stock yards of any and all other traders and purchasers, or hindered their obtaining the same facilities which were therein afforded by the stock yards company to the defendants as members of the exchange, and we think the evidence does not tend to show that the above results have flowed from the adoption and enforcement of the rules and regulations referred to."

As distinguished from this situation the present case shows that the trade of the listed wholesalers is hindered or impeded; that competition is suppressed and the natural flow of commerce interfered with as the direct result of the circulation of the official reports in the manner stated. The case is quite different from the *Anderson Case*. And see *W. W. Montague & Co. v. Lowry*, 193 U. S. 48, 48 L. ed. 612.

A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade. "But," as was said by Mr. Justice LURTON, speaking for the court in *Grenada Lumber Co. v. Mississippi*, 217 U. S. 433, 54 L. ed. 826, "when the plaintiffs in error combine and agree that no one of them will trade with any producer or wholesaler who shall sell to a consumer within the trade range of any of them, quite another case is presented. An act harmless when done by one may become a public wrong when done by many acting

in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed."

When the retailer goes beyond his personal right, and, conspiring and combining with others of like purpose, seeks to obstruct the free course of interstate trade and commerce and to unduly suppress competition by placing obnoxious wholesale dealers under the coercive influence of a condemnatory report circulated among others, actual or possible customers of the offenders, he exceeds his lawful rights, and such action brings him and those acting with him within the condemnation of the act of Congress and the District Court was right in so holding.

It follows that its decree must be affirmed.

(c) Of Labor Units.

LOEWE v. LAWLOR

(Supreme Court of United States, 1908. 208 U. S. 274.)

MR. CHIEF JUSTICE FULLER ³⁷ delivered the opinion of the court:

This was an action brought in the circuit court for the district of Connecticut under § 7 of the anti-trust act of July 2, 1890 [26 Stat. at L. 210, chap. 647, U. S. Comp. Stat. 1901, p. 3202], claiming threefold damages for injuries inflicted on plaintiffs by combination or conspiracy declared to be unlawful by the act.

Defendants filed a demurrer to the complaint, assigning general and special grounds. The demurrer was sustained as to the first six paragraphs, which rested on the ground that the combination stated was not within the Sherman act, and this rendered it unnecessary to pass upon any other questions in the case; and, upon plaintiffs declining to amend

³⁷—Only the opinion of the court is given.

their complaint, the court dismissed it with costs. 148 Fed. 924; and see 142 Fed. 216, 130 Fed. 633.

The case was then carried by writ of error to the circuit court of appeals for the second circuit, and that court, desiring the instruction of this court upon a question arising on the writ of error, certified that question to this court. The certificate consisted of a brief statement of facts, and put the question thus: "Upon this state of facts can plaintiffs maintain an action against defendants under § 7 of the anti-trust act of July 2, 1890?"

After the case on certificate had been docketed here, plaintiffs in error applied, and defendants in error joined in the application, to this court to require the whole record and cause to be sent up for its consideration. The application was granted, and the whole record and cause being thus brought before this court, it devolved upon the court, under § 6 of the judiciary act of 1891, to "decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal." [26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 550.]

The case comes up, then, on complaint and demurrer, and we give the complaint in the margin.³⁸

38—The complaint alleged that the defendants were residents of the district of Connecticut and that complainants resided in Danbury, in that district, were copartners, and located and doing business as manufacturers and sellers of hats there; that they had "a factory for the making of hats, for sale by them in the various states of the Union, and have for many years employed, at said factory, a large number of men in the manufacture and sale of said hats, and have invested in that branch of their business a large amount of capital, and, in their business of selling the product of their factory and filling orders for said hats, have built up and established a large interstate trade, em-

ploying more than two hundred and thirty (230) persons in making and annually selling hats of a value exceeding four hundred thousand (\$400,000) dollars.

"4. The plaintiffs, deeming it their right to manage and conduct their business without interference from individuals or associations not connected therewith, have for many years maintained the policy of refusing to suffer or permit any person or organization to direct or control their said business, and, in consequence of said policy, have conducted their said business upon the broad and patriotic principle of not discriminating against any person seeking employment because of his being or not being connected with

The question is whether, upon the facts therein averred and admitted by the demurrer, this action can be maintained under the anti-trust act.

The 1st, 2d, and 7th sections of that act are as follows:

"1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce

any labor or other organization, and have refused to enter into agreement with any person or organization whereby the rights and privileges, either of themselves or any employee, would be jeopardized, surrendered to, or controlled by, said person or organization, and have believed said policy, which was and is well known to the defendants, to be absolutely necessary to the successful conduct of their said business and the welfare of their employees.

"5. The plaintiffs, for many years, have been and are now, engaged in trade and commerce among the several states of the Union, in selling and shipping almost the whole of the product of their said factory by common carriers, from said Danbury to wholesale dealers residing and doing business in each of the states of Maine, Massachusetts, Rhode Island, New York, New Jersey, Pennsylvania, Maryland, Virginia, Ohio, Illinois, Michigan, Wisconsin, Missouri, Nebraska, Arkansas, California, and other states, to the amount of many hundreds of thousands of dollars, and in sending agents with samples from said Danbury into and through each of said states to visit said wholesale dealers at their places of business in said several states, and solicit and procure from them orders for said hats, to be filled by hats to be shipped from their said factory at said Danbury, by common carriers, to said wholesale dealers, to be by them paid

for after the delivery thereof at their several places of business.

"6. On July 25, 1902, the amount of capital invested by the plaintiffs in said business of making and selling hats approximated \$130,000, and the value of the hats annually sold and shipped by them in previous years, to said dealers in states other than Connecticut, exceeded \$400,000, while the value of hats sold by them in the state of Connecticut did not exceed \$10,000.

"7. On July 25, 1902, the plaintiffs had made preparations to do a large and profitable business with said wholesale dealers in other states, and the condition of their business was such as to warrant the full belief that the ensuing year would be the most successful in their experience. Their factory was then running to its full capacity in filling a large number of orders from such wholesale dealers in other states. They were then employing about 160 men in the making and finishing departments, a large number in the trimming and other departments, whose work was dependent upon the previous work of the makers and finishers, and they then had about 150 dozens of hats in process of manufacture, and in such condition as to be perishable and ruined if work was stopped upon them.

"8. The plaintiffs then were and now are almost wholly dependent upon the sale and shipments of hats

among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thou-

as aforesaid, to said dealers in states other than Connecticut, to keep their said factory running and to dispose of its product and their capital in said business profitably employed, and the restraint, curtailment, and destruction of their said trade and commerce with their said customers in said states other than Connecticut, by the combination, conspiracy, and acts of the defendants, as hereinafter set forth, have been and now are of serious damage to the property and business of the plaintiffs, as hereinafter set forth.

"9. The individual defendants, named in this writ, are all members of a combination or association of persons, styling themselves the United Hatters of North America, and said combination includes more than 9,000 persons, residing in the several states of Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Indiana, Illinois, Missouri, California, and the Province of Ontario in the Dominion of Canada. The said combination is subdivided into 20 sub-combinations, each of which is by themselves styled a local union of the United Hatters of North America. Six of said sub-combinations are in the state of Connecticut, and known as local Unions 1 and 2, 10 and 11, and 15 and 16 of the United Hatters of North America, and have an aggregate membership of more than 3,000 persons residing in the state of Connecticut.

"10. Said combination of per-

sons, collectively known as the United Hatters of North America, owns, controls, edits, publishes, and issues a paper styled the Journal of the United Hatters of North America, in which are published reports of many of the acts of its agents, hereinafter mentioned, which circulates widely among its members and the public, and which affords a ready, convenient, powerful, and effective vehicle for the dissemination of information to its members and the public as to boycotts declared and pushed by them, and of the acts and measures of its members and agents for carrying such boycotts into effect, and was so used by them in connection with the acts of the defendants hereinafter set forth.

"11. Said combination owns and absolutely controls the use of a certain label or distinguishing mark, which it styles the Union Label of the United Hatters of North America, which mark, when so used by them, affords to them a ready, convenient, and effective instrument and means of boycotting the hats of any manufacturer against whom they may desire to use it for that purpose.

"12. The defendants in this suit are also all members of a combination or association of persons calling themselves and known as the American Federation of Labor, which includes more than 1,400,000 members residing in the several states and territories of the Union, and in the Dominion of Canada, and

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sand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

"2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce

in all the places in the several states where the wholesale dealers in hats, hereinbefore mentioned, and their customers, reside and do business. Said combination is subdivided in subordinate groups, or combinations, comprising 110 national and international unions and combinations, of which the said combination of persons styling themselves the United Hatters of North America is one, composed of 12,000 local unions, 28 state federations or combinations, more than 500 central labor unions or combinations, and more than 2,000 local unions or combinations, which are not included in the above-mentioned national and international combinations.

"13. Said combination of persons collectively known as the American Federation of Labor owns, controls, edits, publishes, and issues a paper or magazine called the American Federationist, which it declares to be its official organ and mouth-piece, which has a very wide circulation among its members and others, and which affords a ready, convenient, powerful, and effective vehicle and instrument for the dissemination of information, as to persons, their products and manufactures, boycotted or to be boycotted, by its members, and as to measures adopted and statements to be published, detrimental to such persons and to the sale of their manufactures, and for boycotting such persons, their manufactures, and said paper has been and now is constant

ly used, printed, and distributed for said purposes among its members and the public, and was so used by the defendants and their confederates in boycotting the products of the firm of F. Berg & Company, of Orange, New Jersey, and H. H. Roelofs & Company, of Philadelphia, Pennsylvania, hat manufacturers, to their very great injury, and until the said firms successively yielded to their demands in pursuance of the general scheme of the defendant, hereinafter set forth.

"14. The persons united in said combination, known as the American Federation of Labor, including the persons in said sub-combination known as the United Hatters of North America, constantly employ more than 1,000 agents in the states and territories of the United States, to push, enforce, and carry into effect all boycotts declared by the said members, including those in aid of the combined scheme, purpose, and effort hereinafter stated, to force all the manufacturers of fur hats in the United States, including the plaintiffs to unionize their factories by restraining and destroying their interstate trade and commerce, as hereinafter stated, all of which said agents act under the immediate supervision and personal direction of one Samuel Gompers who is chief agent of the said combination of persons for said purpose, and of each of the said combinations, and the said agents make monthly reports of their doings in pushing and

among the several states or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

enforcing, and causing to be pushed and enforced, said boycotts, and publish the same monthly in said paper known as the American Federationist, of which he is the editor, appointed by the said members, which said paper, in connection with said statement or summary, is declared to be the authorized and official mouthpiece of each of said sub-combinations, including the said United Hatters of North America. Said statement is declared by the defendants to be a faithful record of the doings of said agents, and each of said statements, made during the period covered by the acts of the defendants against the plaintiffs herein stated, contains the announcement to the members of said combination and the public, that all boycotts declared by them are being by them and their agents pushed, enforced and observed.

"15. Said combination of persons collectively known as the American Federation of Labor, of which the defendants are members, was, by the defendants and their other members, formed for the purpose, among others, of facilitating the declaration and successful maintenance of boycotts, by and for said combination of persons known as the United Hatters of North America, acting through the said Federation of Labor and its other component parts or members, and it and its component parts have frequently declared boycotts, at the request of the defendants, against the business and

product of various hat manufacturers, and have vigorously prosecuted the same by and through the powerful machinery at their command as aforesaid, in carrying out their general scheme herein stated, to the great damage and loss of business of said manufacturers, and particularly during the years of 1901 and 1902, they declared, prosecuted, and waged, at the request of the defendants and their agents, a boycott against the hats made by and the business of H. H. Roelofs & Company, of Philadelphia, Pennsylvania, until, by causing them great damage and loss of business, they coerced them into yielding to the demand of the defendants and their agents, by the said factory of said Roelofs & Company be unionized, as termed by the defendants, and into agreeing to employ, and employing exclusively, members of their said combination in the making and finishing departments of said factory, and in large measure surrendering to the defendants and their agents the control of said factory and business, all of which was well known to the plaintiffs, their customers, wholesale dealers, and the public, and was, by the defendants and their agents, widely proclaimed through all their agencies above mentioned, in connection with their acts against the plaintiffs, as hereinafter set forth, for the purpose of intimidating and coercing said wholesale dealers and their customers from buying the hats of the plaintiffs, by creating in

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"7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found,

their minds the fear that the defendants would invoke and put into operation against them all said powerful means, measures, and machinery, if they should handle the hats of the plaintiffs.

"16. The defendants, together with the other persons united with them in said combination, known as the United Hatters of North America, have been for many years, and now are, engaged in a combined scheme and effort to force all manufacturers of fur hats in the United States, including the plaintiffs, against their will and their previous policy of carrying on their business, to organize their workmen in the departments of making and finishing, in each of their factories, into an organization, to be part and parcel of the said combination known as the United Hatters of North America, or, as the defendants and their confederates term it, to unionize their shops, with the intent thereby to control the employment of labor in and the operation of said factories, and to subject the same to the direction and control of persons other than the owners of the same, in a manner extremely onerous and distasteful to such owners, and to carry out such scheme, effort, and purpose by restraining and destroying the interstate trade and commerce of such manufacturers by means of intimidation of and threats made to such manufacturers and their customers in the several states, of boycotting them, their product, and

their customers, using therefor all the powerful means at their command as aforesaid, until such time as, from the damage and loss of business resulting therefrom, the said manufacturers should yield to the said demand to unionize their factories.

"17. The defendants and other members of said United Hatters of North America, acting with them and in pursuance of said general combined scheme and purpose, and in carrying the same into effect against said manufacturers, including the plaintiffs, and by use of the means above stated, and the fear thereof, have, within a very few years, forced the following named manufacturers of hats in the United States to yield to their demand, and unionize their factories, viz.: [Here follow 70 names of corporations and individuals]; and until there remained, according to the statements of the defendants, only 12 hat factories in the United States which had not submitted to their said demands, and the defendants, in pursuing their warfare against the plaintiffs, as hereinafter set forth, and in connection with their said acts against them, have made public announcement of that fact and of the firms so coerced by them, in order thereby to increase the effectiveness of their acts in intimidating said wholesale dealers and their customers in states other than Connecticut, from buying hats from plaintiffs, as hereinafter set forth.

without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

In our opinion, the combination described in the declaration is a combination "in restraint of trade or commerce

"18. To carry out said scheme and purpose, the defendants have appointed and employed, and do steadily employ, certain special agents to act in their behalf, with full and express authority from them and the other members of said combination, and under explicit instructions from them, to use every means in their power to compel all such manufacturers of hats to so unionize their factories, and each and all of the defendants in this suit did the several acts hereinafter stated, either by themselves or their agents, by them thereto fully authorized.

"19. On or about March 1, 1901, in pursuance of said general scheme and purpose, the defendants and the other members of said combination, the United Hatters of North America, through their agents, the said John A. Moffit, Martin Lawlor, John Phillips, James P. Maher, and Charles J. Barrett, who acted for themselves and the other defendants, demanded of the plaintiffs that they should unionize their said factory, in the making and finishing departments, and also thereby acquire the right to the said Union label, subject to the right of the defendants to recall the same at pleasure, in all hats made by them, and then notified the plaintiffs that, if they failed to yield to said demand, the defendants and all the other members of the said combination known as the United Hatters of North America would resort to their said usual and well-known methods to compel them

so to do. After several conferences, and in April, 1901, the plaintiffs replied to the said demand of the defendants as follows:

" 'Firmly believing that we are acting for the best interests of our firm, for the best interests of those whom we employ, and for the best interests of Danbury, by operating an independent or open factory, we hereby notify you that we decline to have our shop unionized, and, if attacked, shall use all lawful means to protect our business interests.'

"The plaintiffs were then employing many union and nonunion men, and their said factory was running smoothly and satisfactory both to the plaintiffs and their employees. The defendants, their confederates and agents, deferred the execution of their said threat against the plaintiffs until the conclusion of their attack made in pursuance of the same general scheme and purpose against H. H. Roelofs & Company, which resulted in the surrender of Roelofs & Company on July 15, 1902, except that the defendants, their confederates and agents, in November, 1901, caused the said American Federation of Labor to declare a boycott against any dealer or dealers who should handle the products of the plaintiffs.

"20. On or about July 25, 1902, the defendants, individually and collectively, and as members of said combinations and associations, and with other persons whose names are unknown to the plaintiffs, associated

among the several states," in the sense in which those words are used in the act, and the action can be maintained accordingly.

And that conclusion rests on many judgments of this court, to the effect that the act prohibits any combination whatever

with them, in pursuance of the general scheme and purpose aforesaid, to force all manufacturers of fur hats, and particularly the plaintiffs, to so unionize their factories, wantonly, wrongfully, maliciously, unlawfully, and in violation of the provisions of the 'act of Congress approved July 2, 1890,' [26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200], and entitled 'An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies,' and with intent to injure the property and business of the said plaintiffs by means of acts done which are forbidden and declared to be unlawful by said act of Congress, entered into a combination and conspiracy to restrain the plaintiffs and their customers in states other than Connecticut in carrying on said trade and commerce among the several states and to wholly prevent them from engaging in and carrying on said trade and commerce between them, and to prevent the plaintiffs from selling their hats to wholesale dealers and purchasers in said states other than Connecticut and to prevent said dealers and customers in said other states from buying the same, and to prevent the plaintiffs from obtaining orders for their hats from such customers, and filling the same, and shipping said hats to said customers in said states as aforesaid, and thereby injure the plaintiffs in their property and business, and to render unsalable the product and output

of their said factory, so the subject of interstate commerce, in whosever's hands the same might be or come, through said interstate trade and commerce, and to employ as means to carry out said combination and conspiracy and the purposes thereof, and accomplish the same, the following measures and acts, viz.:

"To cause, by means of threats and coercion, and without warning or information to the plaintiffs, the concerted and simultaneous withdrawal of all the makers and finishers of hats then working for them, who were not members of their said combination, the United Hatters of North America, as well as those who were such members, and thereby cripple the operation of the plaintiffs' factory, and prevent the plaintiffs from filling a large number of orders then on hand, from such wholesale dealers in states other than Connecticut, which they had engaged to fill and were then in the act of filling, as was well known to the defendants; in connection therewith to declare a boycott against all hats made for sale and sold and delivered, or to be sold or delivered, by the plaintiffs to said wholesale dealers in states other than Connecticut, and to actively boycott the same and the business of those who should deal in them, and thereby prevent the sale of the same by those in whose hands they might be or come through said interstate trade in said several states; to procure

to secure action which essentially obstructs the free flow of commerce between the states, or restricts, in that regard, the liberty of a trader to engage in business.

The combination charged falls within the class of restraints of trade aimed at compelling third parties and strangers

and cause others of said combinations united with them in said American Federation of Labor, in like manner to declare a boycott against and to actively boycott the same and the business of such wholesale dealers as should buy or sell them, and of those who should purchase them from such wholesale dealers; to intimidate such wholesale dealers from purchasing or dealing in the hats of the plaintiff by informing them that the American Federation of Labor had declared a boycott against the product of the plaintiffs and against any dealer who should handle it, and that the same was to be actively pressed against them, and by distributing circulars containing notices that such dealers and their customers were to be boycotted; to threaten with a boycott those customers who should buy any goods whatever, even though union-made, of such boycotted dealers, and at the same time to notify such wholesale dealers that they were at liberty to deal in the hats of any other nonunion manufacturer of similar quality to those made by the plaintiffs, but must not deal in the hats made by the plaintiffs under threats of such boycotting; to falsely represent to said wholesale dealers and their customers, that the plaintiffs had discriminated against the union men in their employ, had thrown them out of employment because they refused to give up their union cards and teach boys, who were intended to take their places after seven months' in-

struction, and had driven their employees to extreme measures 'by their persistent, unfair, and un-American policy of antagonizing union labor, forcing wages to a starvation scale, and given boys and cheap, unskilled foreign labor preference over experienced and capable union workmen,' in order to intimidate said dealers from purchasing said hats by reason of the prejudice thereby created against the plaintiffs and the hats made by them among those who might otherwise purchase them; to use the said union label of said the United Hatters of North America as an instrument to aid them in carrying out said conspiracy and combination against the plaintiffs' and their customers' interstate trade aforesaid, and, in connection with the boycotting above mentioned, for the purpose of describing and identifying the hats of the plaintiffs, and singling them out to be so boycotted; to employ a large number of agents to visit said wholesale dealers and their customers, at their several places of business, and threaten them with loss of business if they should buy or handle the hats of the plaintiffs, and thereby prevent them from buying said hats, and, in connection therewith, to cause said dealers to be waited upon by committees representing large combinations of persons in their several localities to make similar threats to them; to use the daily press in the localities where such wholesale dealers reside and do busi-

involuntarily not to engage in the course of trade except on conditions that the combination imposes; and there is no doubt that (to quote from the well-known work of Chief Justice *ERLE* on Trade Unions) "at common law every person has individually, and the public also has collectively, a

ness, to announce and advertise the said boycotts against the hats of the plaintiffs and said wholesale dealers, and thereby make the same more effective and oppressive, and to use the columns of their said paper, the *Journal of the United Hatters of North America*, for that purpose, and to describe the acts of their said agents in prosecuting the same.

"21. Afterwards, to wit, on July 25, 1902, and on divers days since hitherto, the defendants, in pursuance of said combination and conspiracy, and to carry the same into effect, did cause the concerted and simultaneous withdrawal, by means of threats and coercion made by them, and without previous warning or information thereof to the plaintiffs, of all but 10 of the nonunion makers and finishers of hats then working for them, as well as all of their union makers and finishers, leaving large numbers of hats in an unfinished and perishable condition, with intent to cripple, and did thereby cripple, the operation of the plaintiffs' factory until the latter part of October, 1902, and thereby prevented the plaintiffs from filling a large number of orders then on hand from such wholesale dealers in states other than Connecticut, which they had engaged to fill, and were then in the act of filling, as well known to the defendants, and thereby caused the loss to the plaintiffs of many orders from said wholesale dealers in other states, and greatly hindered and delayed them in filling

such orders, and falsely representing to said wholesale dealers, their customers, and the public generally in states other than Connecticut, that the plaintiffs had discriminated against the union men in their employment, and had discharged or thrown out of employment their union men in August, 1902; that they had driven their employees to extreme measures by their persistent, unfair, and un-American policy of antagonizing union labor, forcing wages down to a starvation scale, and giving boys and cheap, unskilled foreign labor preference over experienced and capable workmen; that skilled hatters had been discharged from said factory for no other cause than their devotion and adherence to the principles of organized labor in refusing to give up their union cards, and to teach the trade to boys who were intended to take the place of union workmen after seven months' instruction, and that, unable to submit longer to a system of petty tyrannies that might be tolerated in Siberia, but could not be borne by independent Americans, the workmen in the factory inaugurated the strike to compel the firm to recognize their rights, in order to prejudice, and did thereby prejudice, the public against the plaintiffs and their product, and in order to intimidate, and did thereby intimidate, said wholesale dealers and their customers, in states other than Connecticut, from purchasing hats from the plaintiffs by reason

right to require that the course of trade should be kept free from unreasonable obstruction." But the objection here is to the jurisdiction, because, even conceding that the declaration states a case good at common law, it is contended that it does not state one within the statute. Thus, it is said that

of the fear of the prejudice created against said hats; and, in connection therewith, declared a boycott against all hats made for and so sold and delivered, and to be so sold and delivered to said wholesale dealers, in states other than Connecticut, and actively boycotted the same and the business of those who dealt in them in such other states, and thereby restrained and prevented the purchase of the same from the plaintiffs, and the sale of the same by those in whose hands they were, or might thereafter be, in the course of such interstate trade, and caused and procured others of said combinations united with them in the said American Federation of Labor to declare a boycott against the plaintiffs, their product, and against the business of such wholesale dealers in states other than Connecticut, as should buy or sell them, and of those who should purchase from such wholesale dealers any goods whatever, and further intimidated said wholesale dealers from purchasing or dealing in hats made by the plaintiffs, as aforesaid, by informing them that the American Federation of Labor had declared a boycott against the hats of the plaintiffs and against any dealer who should handle them, and that said boycott was to be actively pressed against them, and by sending agents and committees from various of said labor organizations, to threaten said wholesale dealers and their customers with a boycott from them if they purchased or handled

the goods of plaintiffs, and by distributing in San Francisco, California, and other places, circulars containing notices that such dealers and their customers were to be boycotted, and threatened with a boycott, and did actively boycott the customers who did or should buy any goods whatever, even though union-made, of such wholesale dealers so boycotted, and used the daily press to advertise and announce said boycott and the measures taken in pursuance thereof by said labor organizations, particularly the San Francisco Bulletin, in its issues of July 2 and July 4, 1903, and a daily paper published in Richmond, Virginia, on December 10, 1902, and notified such wholesale dealers in states other than Connecticut, that they were at liberty to deal in the hats of any other nonunion hat manufacturer of similar quality to those of the plaintiffs, but they must not deal in hats made by the plaintiffs, under threats of being boycotted for so doing, and used the said union label of the United Hatters of North America as an instrument to aid them in carrying out said combination and conspiracy against the plaintiffs' and their customers' interstate trade, as aforesaid, and, in connection with such boycotting, by using the same and its absence from the hats of the plaintiffs, as an insignia or device to indicate to the purchaser that the hats of the plaintiffs were to be boycotted, and to point them out for that purpose, and employed a large

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the restraint alleged would operate to entirely destroy plaintiffs' business and thereby include intrastate trade as well; that physical obstruction is not alleged as contemplated; and that defendants are not themselves engaged in interstate trade.

number of agents to visit said wholesale dealers and their customers at their several places of business in each of said states, particularly Philadelphia and other places in the state of Pennsylvania, in Baltimore, in the state of Maryland, in Richmond and other places in the state of Virginia, and in San Francisco and other places in the state of California, to intimidate and threaten them, if they should continue to deal in or handle the hats of the plaintiffs, and, among many other instances of like kind, the said William C. Hennelly and Daniel P. Kelly, in behalf of all said defendants, and acting for them, demanded the firm of Triest & Company, wholesale dealers in hats, doing business in said San Francisco, that they should agree not to buy or deal in the hats made by the plaintiffs, under threats made by them to said firm of boycotting their business and that of their customers, and, upon their refusing to comply with such demand and yield to such threats, the defendants, by their said agents, caused announcement to be made in the newspapers of said city that said Triest & Company were to be boycotted therefor, and that the labor council of San Francisco would be addressed by them for that purpose, and that they had procured a boycott to be declared by said labor council, and thereupon the defendants, through their said agents, Hennelly and Kelly, printed, published, issued, and distributed to the retail

dealers in hats, in several states upon the Pacific coast, the following circular, to wit:

"San Francisco Labor Council,
Affiliated with the American Federation of Labor,
Secretary's Office, 927 Market Street,
Rooms, 405, 406, 407 Emma
Spreekel's Building.
Meets every Friday, at 1159 Mission
St.

"Telephone, South, 447.

"Address all communications to
927 Market Street.

"San Francisco, July 3, 1903.

"To whom it may concern:

"At a special meeting of the San Francisco Labor Council held on the above date, the hat-jobbing concern known as Triest & Company, 116 Sansome street, San Francisco, was declared unfair for persistently patronizing the unfair hat-manufacturing concern of D. E. Loewe & Company, Danbury, Connecticut, where the union batters have been on strike, for union conditions, since August 20, 1902. Triest & Company will be retained on the unfair list as long as they handle the product of this unfair hat-manufacturing concern. Union men do not usually patronize retail stores who buy from unfair jobbing houses or manufacturers. Under these circumstances, all friends of organized labor, and those desiring the patronage of organized workers, will not buy goods

We think none of these objections are tenable, and that they are disposed of by previous decisions of this court.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007; United States v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 250; and Northern Securities Co. v. United

from Triest & Company, 116 Sansome street, San Francisco.

"Yours respectfully,

"G. B. Benham,

"President, S. F. Labor Council.

"T. E. Zant,

"Secretary S. F. Labor Council. [L. S.]

"W. C. Hennelly,

"D. F. Kelley,

"Representing United Hatters of North America."

"Also the following, to wit:

"San Francisco Labor Council,
Affiliated with American Federation
of Labor,

Secretary's Office, 927 Market Street,
Rooms 405, 406, 407 Emma

Spreckel's Building.

Meets every Friday, at 1159 Mission
St.

"Telephone, South, 447.

"Address all communications to
927 Market Street.

"San Francisco, July 14, 1903.

"Messrs. ———.

"Gentlemen:—

"We beg leave to call your attention to the following products which are on the unfair list of the American Federation of Labor.

"We do this in order that you refrain from handling these goods, as the patronage of the firms named below is taken by the organized workers as an evidence of a desire to patronize those who are opposed to the interests of organized labor. The declaration of unfairness re-

garding the firms mentioned is fully sanctioned and will be supported to the fullest degree by the San Francisco Labor Council.

"Trusting that you will be able to avoid the handling of these goods in the future, we are,

"Yours respectfully,

"G. B. Benham,

"President.

"T. E. Zant, Secretary. [L. S.]

"Unfair List.

"Loewe & Company, Danbury, Connecticut, and Triest & Company, 116 Sansome street, San Francisco, hat manufacturers.

"Cluett, Peabody, & Company, shirts and collars, Troy, New York, and 562 Mission street, San Francisco, California.

"United Shirt & Collar Company, Troy, New York, and 25 Sansome street, San Francisco, California.

"Van Zandt, Jacobs, & Company, Troy, New York; Greenbaum, Weil, & Michaels, selling agents, 27 Sansome street, San Francisco, California."

"and caused said circulars to be mailed to and personally delivered to the retail dealers in hats, and the other customers of said Triest & Company, upon the Pacific coast, and to many others, thereby causing the loss of many orders and customers to said Triest & Company and to the plaintiffs, for the purpose of intimidating and coercing said Triest & Company not to deal with the plaintiffs, and thereby

States, 193 U. S. 197, 48 L. ed. 679, hold, in effect, that the anti-trust law has a broader application than the prohibition of restraints of trade unlawful at common law. Thus, in the Trans-Missouri Case it was said that, "assuming that agreements of this nature are not void at common law, and that the various cases cited by the learned courts below show it, the answer to the statement of their validity now is to be found in the terms of the statute under consideration;" and, in the Northern Securities Case, that the act declares "illegal every contract, combination, or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates in restraint of trade or commerce among the several states."

We do not pause to comment on cases such as *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325; *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290; and *Anderson v. United States*, 171 U. S. 604, 43 L. ed. 300, in which the undisputed facts showed that the purpose of the agreement was not to obstruct or restrain interstate commerce. The object and intention of the combination determined its legality.

In *Swift & Co. v. United States*, 196 U. S. 395, 49 L. ed. 523, a bill was brought against a number of corporations, firms, and individuals of different states, alleging that they were engaged in interstate commerce in the purchase, sale, transportation, and delivery, and subsequent resale at the point of delivery, of meats; and that they combined to refrain from bidding against each other in the purchase of cattle; to maintain a uniform price at which the meat should be sold; and

cause the loss of many orders and customers to said Triest & Company and to the plaintiffs.

"22. By means of each and all of said acts done by the defendants in pursuance of said combination and conspiracy, they have greatly restrained, diminished, and, in many places, destroyed the trade and commerce of the plaintiffs with said wholesale dealers, in said states other than Connecticut, by the loss of many orders and customers directly

resulting therefrom, and the plaintiffs have been injured in their business and property by reason of said combination and conspiracy, and the acts of the defendants done in pursuance thereof, and to carry the same into effect, which are declared to be unlawful by said act of Congress, to the amount of eighty thousand (\$80,000) dollars, to recover threefold which damages, under section 7 of said act, this suit is brought."

to maintain uniform charges in delivering meats thus sold through the channels of interstate trade to the various dealers and consumers in other states. And that thus they artificially restrained commerce in fresh meats from the purchase and shipment of live stock from the plains to the final distribution of the meats to the consumers in the markets of the country.

Mr. Justice HOLMES, speaking for the court, said:

"Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one state, with the expectation that they will end their transit after purchase in another, and when, in effect, they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce.

"The general objection is urged that the bill does not set forth sufficient definite or specific facts. This objection is serious, but it seems to us inherent in the nature of the case. The scheme alleged is so vast that it presents a new problem in pleading. If, as we must assume, the scheme is entertained, it is, of course, contrary to the very words of the statute. Its size makes the violation of the law more conspicuous, and yet the same thing makes it impossible to fasten the principal fact to a certain time and place. The elements, too, are so numerous and shifting, even the constituent parts alleged are, and from their nature must be, so extensive in time and space, that something of the same impossibility applies to them.

.....
"The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body, and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately, when we take them up as distinct charges, they are alleged sufficiently as elements of a scheme. It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together

as the parts of a single plan. The plan may make the parts unlawful."

And the same principle was expressed in *Aikens v. Wisconsin*, 195 U. S. 191, 49 L. ed. 154, involving a statute of Wisconsin prohibiting combinations "for the purpose of wilfully or maliciously injuring another in his reputation, trade, business, or profession, by any means whatever," etc., in which Mr. Justice HOLMES said:

"The statute is directed against a series of acts, and acts of several, the acts of combining, with intent to do other acts. 'The very plot is an act in itself.' *Muleahy v. Queen*, L. R. 3 H. L. 306, 317. But an act, which, in itself, is merely a voluntary muscular contraction, derives all its character from the consequences which will follow it under the circumstances in which it was done. When the acts consist of making a combination calculated to cause temporal damage, the power to punish such acts, when done maliciously, cannot be denied because they are to be followed and worked out by conduct which might have been lawful if not preceded by the acts. No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and, if it is a step in a plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law."

In *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, the petition alleged that the defendants were practically the only manufacturers of cast iron within thirty-six states and territories, that they had entered into a combination by which they agreed not to compete with each other in the sale of pipe, and the territory through which the constituent companies could make sales was allotted between them. This court held that the agreement, which, prior to any act of transportation, limited the prices at which the pipe could be sold after transportation, was within the law. Mr. Justice PECKHAM, delivering the opinion, said: "And when Congress has enacted a statute such as the one in question, any agreement or combination which directly operates not alone upon the manufacture, but upon the sale, transportation, and delivery of an article of interstate commerce,

by preventing or restricting its sale, etc., thereby regulates interstate commerce."

In *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. ed. 608, which was an action brought by a private citizen under § 7 against a combination engaged in the manufacture of tiles, defendants were wholesale dealers in tiles in California, and combined with manufacturers in other state to restrain the interstate traffic in tiles by refusing to sell any tiles to any wholesale dealer in California who was not a member of the association, except at a prohibitive rate. The case was a commercial boycott against such dealers in California as would not or could not obtain membership in the association. The restraint did not consist in a physical obstruction of interstate commerce, but in the fact that the plaintiff and other independent dealers could not purchase their tiles from manufacturers in other states because such manufacturers had combined to boycott them. This court held that this obstruction to the purchase of tiles, a fact antecedent to physical transportation, was within the prohibition of the act. Mr. Justice Peckham, speaking for the court, said, concerning the agreement, that it "restrained trade, for it narrowed the market for the sale of tiles in California from the manufacturers and dealers therein in other states, so that they could only be sold to the members of the association, and it enhanced prices to the nonmember."

The averments here are that there was an existing interstate traffic between plaintiffs and citizens of other states, and that, for the direct purpose of destroying such interstate traffic, defendants combined not merely to prevent plaintiffs from manufacturing articles then and there intended for transportation beyond the state, but also to prevent the vendees from reselling the hats which they had imported from Connecticut, or from further negotiating with plaintiffs for the purchase and intertransportation of such hats from Connecticut to the various places of destination. So that, although some of the means whereby the interstate traffic was to be destroyed were acts within a state, and some of them were, in themselves, as a part of their obvious purpose and effect, beyond the scope of Federal authority, still, as we have seen, the acts must be considered as a whole, and the plan is open

to condemnation, notwithstanding a negligible amount of intrastate business might be affected in carrying it out. If the purposes of the combination were, as alleged, to prevent any interstate transportation at all, the fact that the means operated at one end before physical transportation commenced, and, at the other end, after the physical transportation ended, was immaterial.

Nor can the act in question be held inapplicable because defendants were not themselves engaged in interstate commerce. The act made no distinction between classes. It provided that "every" contract, combination, or conspiracy in restraint of trade was illegal. The records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the act, and that all these efforts failed, so that the act remained as we have it before us.

In an early case (*United States v. Workingmen's Amalgamated Council*, 26 L.R.A. 158, 4 Inters. Com. Rep. 831), the United States filed a bill under the Sherman act in the circuit court for the eastern district of Louisiana, averring the existence of "a gigantic and widespread combination of the members of a multitude of separate organizations for the purpose of restraining the commerce among the several states and with foreign countries," and it was contended that the statute did not refer to combinations of laborers. But the court, granting the injunction, said:

"I think the congressional debates show that the statute had its origin in the evils of massed capital; but, when the Congress came to formulating the prohibition, which is the yardstick for measuring the complainant's right to the injunction, it expressed it in these words: 'Every contract or combination in the form of trust, or otherwise in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal.' The subject had so broadened in the minds of the legislators that the source of the evil was not regarded as material, and the evil in its entirety is dealt with. They made the interdiction include combinations of labor as well as of capital; in fact, all combinations in restraint of commerce, without reference to the character of the persons who entered into them. It is true

this statute has not been much expounded by judges, but, as it seems to me, its meaning, as far as relates to the sort of combinations to which it is to apply, is manifest, and that it includes combinations which are composed of laborers acting in the interest of laborers.

“It is the successful effort of the combination of the defendants to intimidate and overawe others who were at work in conducting or carrying on the commerce of the country, in which the court finds their error and their violation of the statute. One of the intended results of their combined action was the forced stagnation of all the commerce which flowed through New Orleans. This intent and combined action are none the less unlawful because they included in their scope the paralysis of all other business within the city as well.”

The case was affirmed on appeal by the circuit court of appeals for the fifth circuit. 6 C. C. A. 258, 13 U. S. App. 426.

Subsequently came the litigation over the Pullman strike and the decisions *Re Debs*, 5 Inters. Com. Rep. 163, 158 U. S. 564, 39 L. ed. 1092. The bill in that case was filed by the United States against the officers of the American Railway Union, which alleged that a labor dispute existed between the Pullman Palace Car Company and its employees; that thereafter the four officers of the railway union combined together and with others to compel an adjustment of such dispute by creating a boycott against the cars of the car company; that, to make such boycott effective, they had already prevented certain of the railroads running out of Chicago from operating their trains; that they asserted that they could and would tie up, paralyze, and break down any and every railroad which did not accede to their demands, and that the purpose and intention of the combination was “to secure unto themselves the entire control of the interstate, industrial, and commercial business in which the population of the city of Chicago and of the other communities along the lines of road of said railways are engaged with each other, and to restrain any and all other persons from any independent control or management of such interstate, industrial, or commercial enterprises, save according to the will and with the consent of the defendants.”

The circuit court proceeded principally upon the Sherman anti-trust law, and granted an injunction. In this court the case was rested upon the broader ground that the Federal government had full power over interstate commerce and over the transmission of the mails, and, in the exercise of those powers, could remove everything put upon highways, natural or artificial, to obstruct the passage of interstate commerce, or the carrying of the mails. But, in reference to the anti-trust act, the court expressly stated:

"We enter into no examination of the act of July 2, 1890, chap. 647, 26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3200, upon which the circuit court relied mainly to sustain its jurisdiction. It must not be understood from this that we dissent from the conclusions of that court in reference to the scope of the act, but simply that we prefer to rest our judgment on the broader ground which has been discussed in this opinion, believing it of importance that the principles underlying it should be fully stated and affirmed."

And, in the opinion, Mr. Justice BREWER, among other things, said (p. 581):

"It is curious to note the fact that in a large proportion of the cases in respect to interstate commerce brought to this court the question presented was of the validity of state legislation in its bearings upon interstate commerce, and the uniform course of decision has been to declare that it is not within the competency of a state to legislate in such a manner as to obstruct interstate commerce. If a state, with its recognized powers of sovereignty, is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that state has a power which the state itself does not possess?"

The question answers itself; and, in the light of the authorities, the only inquiry is as to the sufficiency of the averments of fact. We have given the declaration in full in the margin, and it appears therefrom that it is charged that defendants formed a combination to directly restrain plaintiffs' trade; that the trade to be restrained was interstate; that certain means to attain such restraint were contrived to be used and employed to that end; that those means were so used and

employed by defendants, and that thereby they injured plaintiffs' property and business.

At the risk of tediousness, we repeat that the complaint averred that plaintiffs were manufacturers of hats in Danbury, Connecticut, having a factory there, and were then and there engaged in an interstate trade in some twenty states other than the state of Connecticut; that they were practically dependent upon such interstate trade to consume the product of their factory, only a small percentage of their entire output being consumed in the state of Connecticut; that, at the time the alleged combination was formed, they were in the process of manufacturing a large number of hats for the purpose of fulfilling engagements then actually made with consignees and wholesale dealers in states other than Connecticut, and that, if prevented from carrying on the work of manufacturing these hats, they would be unable to complete their engagements.

That defendants were members of a vast combination called The United Hatters of North America, comprising about 9,000 members, and including a large number of subordinate unions, and that they were combined with some 1,400,000 others into another association known as The American Federation of Labor, of which they were members, whose members resided in all the places in the several states where the wholesale dealers in hats and their customers resided and did business; that defendants were "engaged in a combined scheme and effort to force all manufacturers of fur hats in the United States, including the plaintiffs, against their will and their previous policy of carrying on their business, to organize their workmen in the departments of making and finishing, in each of their factories, into an organization, to be part and parcel of the said combination known as the United Hatters of North America, or, as the defendants and their confederates term it, to unionize their shops, with the intent thereby to control the employment of labor in and the operation of said factories, and to subject the same to the direction and control of persons other than the owners of the same, in a manner extremely onerous and distasteful to such owners, and to carry out such scheme, effort, and purpose by restraining and destroying the interstate trade and commerce of such manufac-

turers, by means of intimidation of and threats made to such manufacturers and their customers in the several states, of boycotting them, their product, and their customers, using therefor all the powerful means at their command as aforesaid, until such time as, from the damage and loss of business resulting therefrom, the said manufacturers should yield to the said demand to unionize their factories."

That the conspiracy or combination was so far progressed that out of eighty-two manufacturers of this country engaged in the production of fur hats, seventy had accepted the terms and acceded to the demand that the shop should be conducted in accordance, so far as conditions of employment were concerned, with the will of the American Federation of Labor; that the local union demanded of plaintiffs that they should unionize their shop under peril of being boycotted by this combination, which demand plaintiffs declined to comply with; that thereupon the American Federation of Labor, acting through its official organ and through its organizers, declared a boycott.

The complaint then thus continued:

"20. On or about July 25, 1902, the defendants individually and collectively, and as members of said combinations and associations, and with other persons whose names are unknown to the plaintiffs, associated with them, in pursuance of the general scheme and purpose aforesaid, to force all manufacturers of fur hats, and particularly the plaintiffs, to so unionize their factories, wantonly, wrongfully, maliciously, unlawfully, and in violation of the provisions of the 'act of Congress approved July 2, 1890' [26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200], and entitled 'An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies,' and with intent to injure the property and business of the plaintiffs by means of acts done which are forbidden and declared to be unlawful by said act of Congress, entered into a combination and conspiracy to restrain the plaintiffs and their customers in states other than Connecticut, in carrying on said trade and commerce among the several states, and to wholly prevent them from engaging in and carrying on said trade and commerce between them and to prevent the plaintiffs from selling their hats to wholesale

dealers and purchasers in said states other than Connecticut, and to prevent said dealers and customers in said other states from buying the same, and to prevent the plaintiffs from obtaining orders for their hats from such customers, and filling the same, and shipping said hats to said customers in said states, as aforesaid, and thereby injure the plaintiffs in their property and business, and to render unsalable the product and output of their said factory, so the subject of interstate commerce, in whosoever's hands the same might be or come, through said interstate trade and commerce, and to employ as means to carry out said combination and conspiracy and the purposes thereof, and accomplish the same, the following measures and acts, *viz.*:

“To cause, by means of threats and coercion, and without warning or information to the plaintiffs, the concerted and simultaneous withdrawal of all the makers and finishers of hats then working for them, who were not members of their said combination, the United Hatters of North America, as well as those who were such members, and thereby cripple the operation of the plaintiffs' factory, and prevent the plaintiffs from filling a large number of orders then on hand, from such wholesale dealers in states other than Connecticut, which they had engaged to fill and were then in the act of filling, as was well known to the defendants; in connection therewith to declare a boycott against all hats made for sale and sold and delivered, or to be so sold or delivered, by the plaintiffs to said wholesale dealers in states other than Connecticut, and to actively boycott the same and the business of those who should deal in them, and thereby prevent the sale of the same by those in whose hands they might be or come through said interstate trade in said several states; to procure and cause others of said combinations united with them in said American Federation of Labor in like manner to declare a boycott against, and to actively boycott, the same and the business of such wholesale dealers as should buy or sell them, and of those who should purchase them from such wholesale dealers; to intimidate such wholesale dealers from purchasing or dealing in the hats of the plaintiffs by informing them that the American Federation of Labor had declared a boycott against the product of the plaintiffs and against any dealer who should handle it, and

that the same was to be actively pressed against them, and by distributing circulars containing notices that such dealers and their customers were to be boycotted; to threaten with a boycott those customers who should buy any goods whatever, even though union-made, of such boycotted dealers, and at the same time to notify such wholesale dealers that they were at liberty to deal in the hats of any other nonunion manufacturer of similar quality to those made by the plaintiffs, but must not deal in the hats made by the plaintiffs under threats of such boycotting; to falsely represent to said wholesale dealers and their customers, that the plaintiffs had discriminated against the union men in their employ, had thrown them out of employment because they refused to give up their union cards and teach boys, who were intended to take their places after seven months' instruction, and had driven their employees to extreme measures 'by their persistent, unfair, and un-American policy of antagonizing union labor, forcing wages to a starvation scale, and giving boys and cheap, unskilled foreign labor preference over experienced and capable union workmen,' in order to intimidate said dealers from purchasing said hats by reason of the prejudice thereby created against the plaintiffs and the hats made by them among those who might otherwise purchase them; to use the said union label of said the United Hatters of North America as an instrument to aid them in carrying out said conspiracy and combination against the plaintiffs' and their customers' interstate trade aforesaid, and, in connection with the boycotting above mentioned, for the purpose of describing and identifying the hats of the plaintiffs and singling them out to be so boycotted; to employ a large number of agents to visit said wholesale dealers and their customers, at their several places of business, and threaten them with loss of business if they should buy or handle the hats of the plaintiffs, and thereby prevent them from buying said hats, and, in connection therewith, to cause said dealers to be waited upon by committees representing large combinations of persons in their several localities to make similar threats to them; to use the daily press in the localities where such wholesale dealers reside and do business, to announce and advertise the said boycotts against the hats of the plaintiffs and said whole-

sale dealers, and thereby make the same more effective and oppressive, and to use the columns of their said paper, the Journal of the United Hatters of North America, for that purpose, and to describe the acts of their said agents in prosecuting the same."

And then followed the averments that the defendants proceeded to carry out their combination to restrain and destroy interstate trade and commerce between plaintiffs and their customers in other states by employing the identical means contrived for that purpose; and that, by reason of those acts, plaintiffs were damaged in their business and property in some \$80,000.

We think a case within the statute was set up and that the demurrer should have been overruled.

Judgment reversed and cause remanded with a direction to proceed accordingly.

LAWLOR v. LOEWE

(Supreme Court of United States, 1915. 235 U. S. 522.)

MR. JUSTICE HOLMES³⁹ delivered the opinion of the court:

This is an action under the act of July 2, 1890, chap. 647, § 7, 26 Stat. at L. 209, 210, Comp. Stat. 1913, §§ 8820, 8829, for a combination and conspiracy in restraint of commerce among the states, specifically directed against the plaintiffs (defendants in error), among others, and effectively carried out with the infliction of great damage. The declaration was held good on demurrer in 208 U. S. 274, 52 L. ed. 488, 13 Ann. Cas. 815, where it will be found set forth at length. The substance of the charge is that the plaintiffs were hat manufacturers who employed nonunion labor; that the defendants were members of the United Hatters of North America and also of the American Federation of Labor; that in pursuance of a general scheme to unionize the labor employed by manufacturers of fur hats (a purpose previously made effective against all but a few manufacturers), the defendants and

³⁹—Only the opinion of the court is given.

other members of the United Hatters caused the American Federation of Labor to declare a boycott against the plaintiffs and against all hats sold by the plaintiffs to dealers in other states, and against dealers who should deal in them; and that they carried out their plan with such success that they have restrained or destroyed the plaintiff's commerce with other states. The case now has been tried, the plaintiffs have got a verdict, and the judgment of the district court has been affirmed by the circuit court of appeals. 126 C. C. A. 445.

The grounds for discussion under the statute that were not cut away by the decision upon the demurrer have been narrowed still further since the trial by the case of *Eastern States Retail Lumber Dealers' Asso. v. United States*, 234 U. S. 600, 58 L. ed. 1490. Whatever may be the law otherwise, that case establishes that, irrespective of compulsion or even agreement to observe its intimation, the circulation of a list of "unfair dealers," manifestly intended to put the ban upon those whose names appear therein, among an important body of possible customers, combined with a view to joint action and in anticipation of such reports, is within the prohibitions of the Sherman act if it is intended to restrain and restrains commerce among the states.

It requires more than the blindness of justice not to see that many branches of the United Hatters and the Federation of Labor, to both of which the defendants belonged, in pursuance of a plan emanating from headquarters, made use of such lists and of the primary and secondary boycott in their effort to subdue the plaintiffs to their demands. The union label was used and a strike of the plaintiffs' employees was ordered and carried out to the same end, and the purpose to break up the plaintiffs' commerce affected the quality of the acts. *Loewe v. Lawlor*, 208 U. S. 274, 299, 52 L. ed. 488, 500, 13 Ann. Cas. 815. We agree with the circuit court of appeals that a combination and conspiracy forbidden by the statute were proved, and that the question is narrowed to the responsibility of the defendants for what was done by the sanction and procurement of the societies above named.

The court in substance instructed the jury that if these members paid their dues and continued to delegate authority to their officers unlawfully to interfere with the plaintiffs' inter-

state commerce in such circumstances that they knew or ought to have known, and such officers were warranted in the belief that they were acting in the matters within their delegated authority, then such members were jointly liable, and no others. It seems to us that this instruction sufficiently guarded the defendants' rights, and that the defendants got all that they were entitled to ask in not being held chargeable with knowledge as matter of law. It is a tax on credulity to ask anyone to believe that members of labor unions at that time did not know that the primary and secondary boycott and the use of the "We don't patronize" or "Unfair" list were means expected to be employed in the effort to unionize shops. Very possibly they were thought to be lawful. See *Gompers v. United States*, 233 U. S. 604, 58 L. ed. 1115. By the Constitution of the United Hatters the directors are to use "all the means in their power" to bring shops "not under our jurisdiction" "into the trade." The by-laws provide a separate fund to be kept for strikes, lockouts, and agitation for the union label. Members are forbidden to sell nonunion hats. The Federation of Labor, with which the Hatters were affiliated, had organization of labor for one of its objects, helped affiliated unions in trade disputes, and to that end, before the present trouble, had provided in its constitution for prosecuting and had prosecuted many what it called legal boycotts. Their conduct in this and former cases was made public, especially among the members, in every possible way. If the words of the documents, on their face and without explanation, did not authorize what was done, the evidence of what was done publicly and habitually showed their meaning and how they were interpreted. The jury could not but find that by the usage of the unions the acts complained of were authorized, and authorized without regard to their interference with commerce among the states. We think it unnecessary to repeat the evidence of the publicity of this particular struggle in the common newspapers and union prints, evidence that made it almost inconceivable that the defendants, all living in the neighborhood of the plaintiffs, did not know what was done in the specific case. If they did not know that, they were bound to know the constitution of their societies, and at least well might be found

to have known how the words of those constitutions had been construed in act.

It is suggested that injustice was done by the judge speaking of "proof" that, in carrying out the object of the associations, unlawful means had been used with their approval. The judge cautioned the jury with special care not to take their view of what had been proved from him, going even farther than he need have gone. *Graham v. United States*, 231 U. S. 474, 480, 58 L. ed. 319, 324. But the context showed plainly that proof was used here in a popular way for evidence, and must have been understood in that sense.

Damages accruing since the action began were allowed, but only such as were the consequence of acts done before and constituting part of the cause of action declared on. This was correct. *New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 591, 615, 616, 37 L. ed. 292, 304. We shall not discuss the objections to evidence separately and in detail, as we find no error requiring it. The introduction of newspapers, etc., was proper in large part to show publicity in places and directions where the facts were likely to be brought home to the defendants, and also to prove an intended and detrimental consequence of the principal acts, not to speak of other grounds. The reasons given by customers for ceasing to deal with sellers of the Loewe hats, including letters from dealers to Loewe & Co., were admissible. 3 *Wigmore, Ev.* § 1729 (2). We need not repeat or add to what was said by the circuit court of appeals with regard to evidence of the payment of dues after this suit was begun. And, in short, neither the argument nor the perusal of the voluminous brief for the plaintiffs in error shows that they suffered any injustice, or that there was any error requiring the judgment to be reversed.

Judgment affirmed.

SECTION 6

WHO MAY INVOKE A VIOLATION OF THE SHERMAN ACT

BIGELOW v. CALUMET & HECLA MINING CO.

(United States Circuit Court, Western District of Michigan,
1907. 155 Fed. 869.)⁴⁰

Bill by plaintiff, a citizen of Massachusetts and a stockholder of the Osceola Mining Company, a Michigan corporation, to obtain an injunction restraining the Calumet & Hecla Mining Company from voting stock in the Osceola Company, alleged to have been acquired by the Calumet & Hecla Company contrary to the Sherman anti-trust act and the Michigan anti-trust act (Pub. Acts Mich. 1899, p. 409, No. 255; Pub. Acts Mich. 1905, p. 507, No. 329) and the principles of the common law.

The case was heard on a motion for temporary injunction upon bill, answer and affidavits. The temporary injunction was granted.⁴¹

KNAPPEN, District Judge [after reaching a conclusion "that the bill sufficiently alleges an unlawful combination" continued as follows]:

2. The question whether a bill for injunctive relief can be maintained under the federal anti-trust act at the instance of a private party is not free from difficulty. It is strenuously contended that under neither the federal anti-trust act nor the state act can relief by way of injunction be granted to a private party; that section 4 of the federal act, which provides for injunctive relief, is expressly limited to suits brought at the instance of the Attorney General; and that section 7 of the federal act, giving to an injured party a right of action at law for treble damages, considered in connection with section 4 referred to, by necessary implication excludes the right of a private party to maintain any suit except that for treble damages under section 7, regardless of the general equitable jurisdiction of the court. Some of the cases cited affirm this con-

40—Statement abridged and part only of opinion given.

41—The same case on final hearing is reported in 167 Fed. 704, where the bill was dismissed because

there had been no violation of the Sherman Act and this was affirmed by the Court of Appeals in *Bigelow v. Calumet & Hecla Mining Co.*, 167 Fed. 721, on the same ground.

tention. Others of them, in my judgment, do not, but, on the contrary, recognize the rule that the prohibition against injunctive relief under the federal act is limited to suits brought for injuries common to the general public, and that under the general jurisdiction of equity relief may be granted to a private party against violations of the anti-trust act.

In *Blindell v. Hagan* (C. C.) 54 Fed. 40, and *Id.*, 6 C. C. A. 86, relief was asked, first, under the federal anti-trust act; and, second, under the general equity jurisdiction of the court. The district judge held that no one but the Attorney General could file a bill under the anti-trust act, but that, as the court had jurisdiction of the case by reason of diverse citizenship of the parties, it could grant relief upon the grounds of inadequacy of legal remedy and the prevention of multiplicity of suits. The relief granted was given none the less on account of the unlawful combination in restraint of trade.

In *Pideock v. Harrington* (C. C.) 64 Fed. 821, complainant expressly disclaimed any right to relief under the general equity principles of the common law, and planted himself solely on the Sherman act. The district judge sustained a demurrer to the bill. The decision was not reviewed. It does not appear that there was diverse citizenship of the parties, and thus that the court would have had jurisdiction of the case but for the federal question.

In *Gulf, C. & S. F. Ry. Co. v. Miami S. S. Co.*, 30 C. C. A. 142, it was held that no case was stated under either the federal anti-trust act or the common law; but it was said:

"We do not doubt the general jurisdiction of the Circuit Court as a court of equity to afford preventive relief, in a proper case, against threatened injury about to result to an individual, for any unlawful agreement, combination or conspiracy in restraint of trade."

In *So. Ind. Exp. Co. v. U. S. Exp. Co.* (C. C.) 88 Fed. 659, and *Id.*, 35 C. C. A. 172, heard on demurrer to bill, the acts complained of were entirely lawful unless by reason of the federal anti-trust act. It was held that under that law a private party could not obtain relief by bill in equity. It does not appear that the court had jurisdiction by reason of diverse citizenship.

In *Metcalf v. American School Furn. Co.* (C. C.) 108 Fed.

909, and *Id.*, 51 C. C. A. 599, heard on motion for temporary injunction and on demurrer to the bill, complainant sought, first, relief against the monopoly created by the absorption of the Buffalo Company by the American School Furniture Company, and, second, the assessment and collection in the equity suit of the treble damages given by the seventh section of the federal anti-trust act. The district judge held that these damages were recoverable only in an action at law for the sole benefit of the complainant, while the equitable relief was for the benefit of all interested in the corporation, and that the bill was thus multifarious. The right to equitable relief was not, however, denied, but expressly affirmed. After the bill had been amended by eliminating the demand for treble damages, and upon hearing upon demurrers and pleas to the amended bill ([C. C.] 122 Fed. 115), the district judge held that the bill presented no case except under the federal anti-trust law, and that under that law suit for injunctive relief could be brought only at the instance of the Attorney General. This decision has not been reviewed.

While the decisions referred to are entitled to great respect, they do not commend themselves to my judgment so far as they deny the right of a private party, who has sustained special injury by the violation of the anti-trust act, to relief by injunction under the general equity jurisdiction of the court. As already seen, the cases referred to do not generally announce such rule.

The case of *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 70, 72, 48 L. Ed. 870, does not, to my mind, assert the rule contended for by defendant. On the contrary, it seems to recognize by implication a contrary rule. In that case, which was decided since the decisions in all the cases referred to above, the state sought relief under both the Minnesota statute and the federal anti-trust act. It was held that relief could not be given under the Minnesota statute for lack of diverse citizenship of the parties, nor under the federal statute because the injury alleged to have been sustained by the state was not direct or special, but only "remote and indirect; such an injury as would come alike, although in different degrees, to every individual owner of property in a state by reason of the suppression, in violation of the act of Congress, of free competition between interstate carriers engaged in business in such state;

not such a direct, actual injury as that provided for in the seventh section of the statute." It was accordingly merely held (so far as right to relief under the federal anti-trust act is concerned) that the intention of the statute was "to limit direct proceedings in equity to prevent and restrain such violations of the anti-trust act as cause injury to the general public, or to all alike, merely from the suppression of competition in trade and commerce among the several states and with foreign nations, to those instituted in the name of the United States under the fourth section of the act, by district attorneys of the United States, acting under the direction of the Attorney General."

I cannot overlook the fact that the federal anti-trust act is highly remedial. Its apparent object is not to restrict, but to extend, remedies. The seventh section gives the Circuit Courts jurisdiction without respect to the amount in controversy, allows threefold damages and the costs of suit, including a reasonable attorney's fee. The very penal provisions invoked by defendant's counsel as requiring a strict construction of the act are but evidence of the highly remedial nature of the statute, and I am loath to conclude that a statute of this nature should be construed as taking away the otherwise existing jurisdiction of equity to afford relief. In this case jurisdiction is conferred by the diverse citizenship of the parties.

The case of *In re Lennon*, 166 U. S. 548, 41 L. Ed. 1110, is not without pertinency. It was there held (under habeas corpus proceedings alleging lack of jurisdiction) that a bill in equity was properly filed by one railroad company against other railroad companies under the interstate commerce act of February 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154], to restrain the refusal to afford equal facilities to the connecting line, as exhibiting a case arising under the laws of the United States, namely, the interstate commerce act. The court there said (page 554 of 166 U. S. [41 L. Ed. 1110]):

"Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim, or protection, or defense of the party, in whole or in part, by whom they are asserted."

It is noticeable that the act there in question expressly pro-

vided for relief to the injured person either by suit against the offending carrier or through complaint to the commission (sections 8 and 9), but not for injunction, except under circumstances not existing, and by methods not employed in the suit in question.

The bill alleges that the complainant's remedy at law is inadequate, and it may well be. It is fairly inferable from the case presented that, if the control of the Osceola Company by the Calumet & Hecla Company is had, a complete revolution in the management and in the method of operation of the former company will take place. To prove damages as resulting from such a combination, in view of the complete change of methods intended, and under an entirely new management, may well be difficult. The reasons for such difficulty seem too apparent to require elaboration. The Michigan statute, however (Pub. Acts Mich. 1899, p. 409, No. 255), contains no express provision for injunction suits by the district attorney or prosecuting attorneys, although "for a violation of any of the provisions of the act" it authorizes the institution of "proper suits or quo warranto proceedings in a court of competent jurisdiction," which is recognized as giving authority to maintain injunction suits to restrain violations of the anti-trust law. *Hunt v. Riverside Co-operative Club*, *supra*. It is therefore not necessarily subject to the same considerations as the federal statute.

In my opinion, under the case here presented, the objection that remedy by injunction cannot be afforded at the instance of the injured party should not be sustained.⁴² [The opinion as to other points is omitted.]

CONNOLLY v. UNION SEWER PIPE CO.

(Supreme Court of United States, 1902. 184 U. S. 540.)

MR. JUSTICE HARLAN delivered the opinion of the court:

The Union Sewer Pipe Company—a corporation organized under the laws of Ohio and doing business in Illinois—brought

⁴²—See also *Shawnee Compress Co. v. Anderson*, 209 U. S. 423, *ante* p. 785; *Continental Securities Co. v. Interborough Rapid Transit Co.*, 165 Fed. 945.

1200 COMBINATIONS AND RESTRAINT OF TRADE

its action against Thomas Connolly, a citizen of Illinois, in the circuit court of the United States for the northern district of Illinois, on two negotiable promissory notes both executed at Chicago by the defendant; one, dated December 15th, 1894, the other dated January 15th, 1895, and each payable to the order of the plaintiff corporation ninety days after date at the First National Bank of Chicago.

These notes were given on account of the purchase by the defendant from the plaintiff of sewer pipe commonly known as standard Akron pipe, at prices agreed upon between the parties.

The pipe company also brought an action in the same court against William E. Dee, a citizen of Illinois, upon an open account for \$2,389.26, the value at agreed prices of certain pipe purchased by him from the plaintiff in June, 1896. The plaintiff supplied the pipe under a written contract executed between it and the defendant in Illinois under date of August, 1895.

Each of the defendants filed a plea of the general issue, with notice of special defenses and of set-off.

The special defenses in each case were substantially the same. The notice in the Connolly Case was that the defendant on the trial of the action would rely on these special matters:

“First. That the plaintiff is, and at all times since about the 1st day of January, 1893, has been, a trust or combination of the capital, skill, and acts of divers persons and corporations carrying on a commercial business in the states of Ohio and Illinois and between said states and elsewhere in the United States of America, and organized for the express purpose of unlawfully and contrary to the common law creating and carrying out restrictions in trade, to wit, in the trade of buying, selling, and otherwise dealing in certain articles of merchandise, to wit, sewer, and drainage pipes, and also for the express purpose of unlawfully and contrary to the common law limiting the production of said articles of merchandise and increasing the market price thereof; and also for the express purpose of unlawfully and contrary to the common law preventing competition in the manufacture, making, transportation, sale, or purchase of said articles of commerce; also for the express purpose of unlawfully and contrary to the common

law fixing standards or figures whereby the prices of said articles of merchandise intended for sale, use, and consumption in this state should be controlled and established; and also for the express purpose of unlawfully and contrary to the common law being a pretended agency whereby the sale of said articles of commerce should and might be covered up and made to appear to be for the original vendors thereof, and so as to enable the original vendors or manufacturers thereof to control the wholesale and retail price of such articles of commerce after the title thereto had passed from such vendors or manufacturers; and for the further express purpose of unlawfully and contrary to the common law making and entering into and carrying out a certain contract or certain contracts by which the several persons or corporations forming the plaintiff, or being the pretended stockholders thereof, to wit, have bound themselves not to sell, dispose of, or transport said articles of commerce below certain common standard figures or card or list prices in excess of the true market values thereof, and by which they have agreed to keep the prices of said articles of commerce at certain fixed or graduated figures, and by which they have established certain settled prices of said articles of commerce between themselves and others, so as to preclude a free and unrestricted competition among themselves and others in the sale and transportation of said articles of commerce, and by which they have agreed to pool, combine, and unite any interests they may have in connection with the sale and transportation of said articles of commerce so that the prices thereof may effect advantageously to themselves; that all of the claims of the plaintiff against the defendant in this action arise wholly out of, and are in respect of, sales of said articles of merchandise made between the 1st day of January, A. D. 1893, and the 1st day of March, 1896, to this defendant by the plaintiff in the ordinary course of its business as such a trust or combination acting as aforesaid, and that this action is brought to recover the alleged price thereof and for no other purpose.

“Secondly. That the plaintiff is, and at all times since the 1st day of January, 1893, was, a combination in the form of a trust, in restraint of trade and commerce among the several states, and doing business as such throughout the United States and between the states of Ohio and Illinois, contrary to the

provisions of an act of Congress of date of July 2d, 1890, and entitled 'An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies,' and that this action is brought solely to recover the price of articles of merchandise, to wit, sewer and drainage pipes, sold to the defendant by the plaintiff, then and there acting and doing business as such a combination, as aforesaid, in violation of the provisions of said act.

"Thirdly. That the plaintiff is, and at all times since the 1st of January, 1893, was, a trust doing business as such in the state of Illinois and elsewhere, contrary to the provisions of an act of the legislature of the state of Illinois entitled 'An Act to Define Trusts and Conspiracies against Trade, Declaring Contracts in Violation of This Provision Void, and Making Certain Acts and Violations Thereof Misdemeanors, and Prescribing Punishment Thereof and Matters Connected Therewith, Approved June 20th, 1893, in Force July 1st, 1893;' that this action is brought solely to recover the price of articles of merchandise, to wit, sewer and drainage pipes, sold to the defendant by the plaintiff, then and there acting and doing business in violation of the provisions of said act, and that the defendant hereby pleads said act in defense to this action and the whole thereof."

The set-offs claimed by Connolly were: Treble the amount of the actual damages sustained and allowed by the act of Congress of July 2d, 1890, chap. 647, known as the Sherman anti-trust act, \$56,970.44; actual damages sustained by reason of the violation by the plaintiff of the provisions of the Illinois statute of July 1st, 1893, \$17,323.48; and for money had and received by plaintiff of defendant contrary to law, \$17,323.48.

The set-offs claimed by Dee were of like character, but of larger amounts.

Both cases were, by agreement, submitted to the same jury, and were treated as one consolidated case. At the trial the defendants respectively asked leave to amend their notices of special defenses, but leave was denied.

The circuit court disallowed both the first and second of the above special defenses, and in respect of the third its decision was that the Illinois trust statute of 1893 was in violation of the Constitution of the United States. It consequently directed

the jury to find a verdict for the plaintiff in each case; in the Connolly Case, for the amount of the two notes sued on; in the Dee Case, for the amount of the plaintiff's open accounts against him. Verdicts having been returned as directed, and a motion for new trial in one case, and motions for new trial and in arrest of judgment in the other, having been overruled, judgments were entered on the verdicts.

1. The defendant in error insists that these cases should have gone to the circuit court of appeals, and has moved on that ground that the writ of error be dismissed. The defense in each case was based in part on the Illinois statute of 1893. The plaintiff insisted at the trial that that statute was in violation of the Constitution of the United States, and its position was sustained by the circuit court. There have been suits in which the circuit court upon the claim of the defendant has applied the Constitution of the United States to the case before it, and put the plaintiff out of court. Here, the plaintiff claimed that the state enactment upon which defendants relied was unconstitutional, and its position upon that point was sustained. In *Loeb v. Columbia Twp.* 179 U. S. 47, 477, 45 L. ed. 280, 285, this court said: "The circuit court of appeals act does not declare that the final judgment of a circuit court in a case in which there was a claim of the repugnancy of a state statute to the Constitution of the United States may be reviewed here only upon writ of error sued out by the party making the claim. In other words, if a claim is made in the circuit court, no matter by which party, that a state enactment is invalid under the Constitution of the United States, and that claim is sustained or rejected, then it is consistent with the words of the act, and, we think, in harmony with its object, that this court review the judgment at the instance of the unsuccessful party, whether plaintiff or defendant. It was the purpose of Congress to give opportunity to an unsuccessful litigant to come to this court directly from the circuit court in every case in which a claim is made that a state law is in contravention of the Constitution of the United States." Upon the authority of that case, the motion to dismiss is denied.

2. The defendant Connolly purchased Akron sewer pipe from the plaintiff, and for the agreed price thereof gave the two promissory notes upon which he was sued. The defendant Dee

also purchased Akron sewer pipe at an agreed price as shown by the account upon which he was sued. Each defendant disputed his liability to the plaintiff upon the ground that prior to the making of the contracts with the defendants respectively for pipe, the plaintiff corporation entered into a combination with certain firms, corporations, and companies engaged in Ohio in the manufacture of Akron pipe; which combination, it is alleged, was in illegal restraint of trade, and therefore forbidden by the principles of the common law as recognized and enforced both in Ohio and Illinois.

This defense cannot be maintained. Assuming, as defendants contend, that the alleged combination was illegal if tested by the principles of the common law, still it would not follow that they could, at common law, refuse to pay for pipe bought by them under special contracts with the plaintiff. The illegality of such combination did not prevent the plaintiff corporation from selling pipe that it obtained from its constituent companies or either of them. It could pass a title by a sale to anyone desiring to buy, and the buyer could not justify a refusal to pay for what he bought and received by proving that the seller had previously, in the prosecution of its business, entered into an illegal combination with others in reference generally to the sale of Akron pipe.

In *Strait v. National Harrow Co.* 51 Fed. 819, a suit in which the plaintiffs sought a permanent injunction restraining the defendant from instituting or prosecuting any action against the plaintiffs for the infringement of letters patent owned by the defendant covering certain improvements in spring-tooth harrows, or from instituting or prosecuting any such suits against any person using the spring-tooth harrows manufactured by the plaintiffs, the court said: "In substance, the complaint shows that the defendant has entered into a combination with various other manufacturers of spring-tooth harrows for the purpose of acquiring a monopoly in this country in the manufacture and sale of the same, and, as an incident thereto, has acquired all the rights of the other manufacturers for the exclusive sale and manufacture of such harrows under patents, or interests in patents, owned by them respectively. Such a combination may be an odious and wicked one, but the proposition that the plaintiffs, while infringing the rights vested

in the defendant under letters patent of the United States, is entitled to stop the defendant from bringing or prosecuting any suit therefor because the defendant is an obnoxious corporation, and is seeking to perpetuate the monopoly which is conferred upon it by its title to the letters patent, is a novel one, and entirely unwarranted. The party having such a patent has a right to bring suit on it, not only against a manufacturer who infringes, but against dealers and users of the patented article, if he believes the patent is being infringed; and the motive which prompts him to sue is not open to judicial inquiry, because, having a legal right to sue, it is immaterial whether his motives are good or bad, and he is not required to give his reasons for the attempt to assert his legal rights. 'The exercise of the legal right cannot be affected by the motive which controls it.' *Kiff v. Youmans*, 86 N. Y. 329, 40 Am. Rep. 543."

In *National Distilling Co. v. Cream City Importing Co.* 86 Wis. 352, 355, which was an action to recover the price of goods sold and delivered, one of the defenses was, the plaintiff was a member of an illegal trust or combination to interfere with the freedom of trade and commerce. The supreme court of Wisconsin said: "The first defense does not deny any allegation of the complaint, but the substance of it is that the sale and delivery of the goods in question to the defendant was void as against public policy, because the vendor was at the time a member of an unlawful trust or combination, formed to unlawfully interfere with the freedom of trade and commerce and in restraint thereof and to accomplish the ends therein set forth. . . . Conceding, for the purposes of this case, that the trust or combination in question may be illegal, and its members may be restrained from carrying out the purposes for which it was created by a court of equity in a suit on behalf of the public, or may be subject to indictment and punishment, there is, nevertheless, no allegation showing or tending to show that the contract of sale between the plaintiff and defendant was tainted with any illegality, or was contrary to public policy. The argument, if any the case admits of, is that, as the plaintiff was a member of the so-called 'trust,' or 'combination,' the defendant might voluntarily purchase the goods in question of it at any agreed price, and convert them to its own use, and

be justified in a court of justice in its refusal to pay the plaintiff for them, because of the connection of the vendor with such trust or combination. The plaintiff's cause of action is in no legal sense dependent upon, or affected by, the alleged illegality of the trust or combination, because the illegality, if any, is entirely collateral to the transaction in question, and the court is not called upon in this action to enforce any contract tainted with illegality, or contrary to public policy. The mere fact that the plaintiff is a member of a trust or combination, created with the intent and purposes set forth in the answer, will not disable or prevent it in law from selling goods within or affected by the provisions of such trust or combination, and recovering their price or value. It does not appear that it had stipulated to refrain from such transactions. A contrary doctrine would lead to most startling and dangerous consequences."

That case was cited with approval by the circuit court of appeals for the seventh circuit in *Dennehy v. McNulta*, 41 L. R. A. 609, 611, 612, 30 C. C. A. 422, 424, 427, 59 U. S. App. 264, 270, 273. In that case the court said: "The mere fact that the corporation, as one of the contracting parties, may constitute an unjust monopoly, and that its general business is illegal—a status apparently held in *Distilling & Cattle Feeding Co. v. People ex rel. Moloney*, 156 Ill. 448, cannot serve, *ipso facto*, to create default or liability on its contracts generally; nor can such fact be invoked collaterally to affect in any manner its independent contract obligations." Again: "In the case of an injurious combination of the nature asserted here, the remedy is by well-recognized and direct proceedings; but one who voluntarily and knowingly deals with the parties so combined cannot, on the one hand, take the benefit of his bargain, and, on the other, have a right of action against the seller for the money paid, or any part of it, either upon the ground that the combination is illegal, or that its prices were unreasonable."

It is undoubtedly the general rule that a contract made in violation of a statute is void, and no recovery can be had upon it, as in *Embrey v. Jemison*, 131 U. S. 336, 348, 33 L. ed. 172, 177. That was an action upon a promissory note given in execution of a contract for the purchase of "future delivery" cotton, neither the purchase nor delivery of actual cotton being contemplated by the parties, but the settlement in respect to

which was to be on the basis of the "difference" between the contract price and the market price of cotton futures, according to the fluctuations in the markets. The contract was held to be a wagering contract, and therefore illegal and void. As there could be no recovery upon the original agreement without disclosing the fact that it was illegal and one that could not, for that reason, be enforced or made the basis of a judgment, it was held that attention could not be withdrawn from the illegality of the contract by the device of taking notes for the amount claimed under that contract. So, in *Miller v. Ammon*, 145 U. S. 421, 427, 36 L. ed. 759, 762. That was an action to recover the value of 1,125 gallons of wines sold in Chicago by one who had not obtained a license to sell liquors at all,—an ordinance of that city expressly declaring that no person, firm, or corporation should sell or offer for sale "any spirituous or vinous liquors in quantities of 1 gallon or more at a time, within the city, without having first obtained a license therefor," under a penalty of not less than \$50 or more than \$200 for each offense. It was held that the action could not be maintained, because "an act done in disobedience to the law creates no right of action which a court of justice will enforce." In that case the sale from which it was attempted to imply the promise of the buyer to pay for what he received was itself expressly forbidden by law under a penalty. The action there was upon the sale, and there was a direct connection between it and the purchase of the wines. So, again, in *McMullen v. Hoffman*, 174 U. S. 639, 654, 43 L. ed. 1117, 1123, after an extended review of the cases, American and English, the court said: "The authorities from the earliest time to the present unanimously held that no court will lend its assistance in any way toward carrying out the terms of an illegal contract."

In the present case other considerations must control. This is not an action to enforce or which involves the enforcement of the alleged arrangement or combination between the plaintiff corporation and other corporations, firms, and companies in relation to the sale of Akron pipe. As already suggested, the plaintiff, even if part of a combination illegal at common law, was not for that reason forbidden to sell property it acquired or held for sale. The purchases by the defendants had no necessary or direct connection with the alleged illegal combina-

tion; for the contracts between the defendants and the plaintiff could have been proved without any reference to the arrangement whereby the latter became an illegal combination. If, according to the principles of the common law, the Union Sewer Pipe Company could not have sold or passed title to any pipe it received and held for sale, because of an illegal arrangement previously made with other corporations, firms, or companies, a different question would be presented. But we are aware of no decision to the effect that a sale similar to that made by the present plaintiff to the defendants respectively would in itself be illegal or void under the principles of the common law. The contracts between the plaintiff and the respective defendants were, in every sense, collateral to the alleged agreement between the plaintiff and other corporations, firms, or associations whereby an illegal combination was formed for the sale of sewer pipe.

We are of opinion that the first special defense, based alone upon the principles of the common law, was properly overruled.

3. The special defense based upon the act of Congress of July 2d, 1890, chap. 647, 26 Stat. at L. 209, was also properly rejected.

That act declares illegal "every contract, combination in form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations,"—every person making any such contract or engaging in any such conspiracy being subject to a fine not exceeding \$5,000, or to imprisonment not exceeding one year, or to both punishments in the discretion of the court. § 1. So, every person monopolizing or attempting to monopolize, or combining or conspiring with any other person or persons to monopolize, any part of the trade or commerce among the several states or with foreign nations, is liable by that act to the like penalties in the discretion of the court. § 2. The several circuit courts of the United States are invested with jurisdiction to prevent and restrain violations of its provisions. § 4. Any property owned under any contract or by any combination or pursuant to any conspiracy (and being the subject thereof), and being in the course of transportation from one state to another, or to a foreign country, is subject to be forfeited, seized, and condemned. § 6. By another section it is declared: "Any person

who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee." § 7.

Much of what has just been said in reference to the first special defense, based on the common law, is applicable to this part of the case. If the contract between the plaintiff corporation and the other named corporations, persons, and companies, or the combination thereby formed, was illegal under the act of Congress, then all those, whether persons, corporations, or associations, directly connected therewith, became subject to the penalties prescribed by Congress. But the act does not declare illegal or void any sale made by such combination, or by its agents, of property it acquired or which came into its possession for the purpose of being sold,—such property not being at the time in the course of transportation from one state to another or to a foreign country. The buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode prescribed by the act of Congress; for Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies, and firms. The contracts under which the pipe in question was sold were, as already said, collateral to the arrangement for the combination referred to, and this is not an action to enforce the terms of such arrangement. That combination may have been illegal, and yet the sale to the defendants was valid.

In the case of *The Charles E. Wisewall*, 74 Fed. 802, which was a libel *in rem* by certain tug owners against a steam dredge to recover the value of certain services rendered by the tug in towing the dredges, it was sought to avoid payment for the

services thus rendered upon the ground that the tug owners were members of an association which was illegal and void under the Sherman act. The court, assuming that the agreement by which the tugs acted in unison was prohibited by that act, said: "He [the claimant] should not be permitted to repudiate his just debts to the individual tugs because their association was illegal. Having asked for their services, and having accepted the benefit thereof, he should pay. . . . An agreement by the tug *Mayflower* to tow the dredge *Wisewall*, for a reasonable sum, from Albany to Troy, is not void because the *Mayflower* is associated with other tugs to regulate the price of towing at Albany. Should the claimant purchase a pair of trousers at an Albany clothing shop, he would find it difficult to avoid paying their actual market value because the vendor and other tailors of that city had combined to keep up prices."

Nor can the defendants refuse to pay for what they bought upon the ground that the 7th section of the Sherman act gives the right to any person "injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful" by the act, to sue and recover treble the damages sustained by him. We shall not now attempt to declare the full scope and meaning of that section of the act of Congress. It is sufficient to say that the action which it authorizes must be a direct one, and the damages claimed cannot be set off in these actions based upon special contracts for the sale of pipe that have no direct connection with the alleged arrangement or combination between the plaintiff and other corporations, firms, or companies. Such damages cannot be said, as matter of law, to have directly grown out of that arrangement or combination, and are, besides, unliquidated. Besides, it is well settled in Illinois that "unliquidated damages arising out of covenants, contracts, or torts disconnected with plaintiff's claim cannot be set off under the statute." *Robison v. Hibbs*, 48 Ill. 408, 409, 410; *Hawks v. Lands*, 8 Ill. 227, 232; *Hubbard v. Rogers*, 64 Ill. 434, 437; *Evans v. Hughey*, 76 Ill. 115, 120; *Clause v. Bullock Printing Press Co.* 118 Ill. 612, 617; *Dushane v. Benedict*, 120 U. S. 630, 648, 30 L. ed. 810, 814. If the act of Congress expressly authorized one who purchased property from a combination organized in violation of its provisions to plead, in defense of a

suit for the price, the illegal character of the combination, that would present an entirely different question. But the act contains no such provision.

[The balance of the opinion holding unconstitutional the Illinois anti-trust act of 1893 is omitted. Mr. Justice McKenna dissented on the ground that the Illinois statute was constitutional.]

CONTINENTAL WALL PAPER CO. v. VOIGHT & SONS CO.

(Supreme Court of United States, 1909. 212 U. S. 227.)

This case given *ante*, p. 799.

WILDER MFG. CO. v. CORN PRODUCTS CO.

(Supreme Court of United States, 1915. 236 U. S. 165.)

MR. CHIEF JUSTICE WHITE delivered the opinion of the court:

We refer to the parties, the one as the manufacturing, and the other as the refining company. Sued by the refining company in April, 1909, to recover the amount of the price of two lots of glucose or corn syrup which it had bought in January, 1909, and which it had consumed and not paid for, the manufacturing company asserted its nonliability on the following grounds, which we summarize:

(a) Because the refining company had no legal existence, as it was a combination composed of all the manufacturers of glucose or corn syrup in the United States, illegally organized with the object of monopolizing all dealings in such products, in violation of the anti-trust act of Congress. That having illegally brought into one organization all the manufacturers of glucose or corn syrup, the corporation had unreasonably advanced the price of the products of its manufacture to the injury of the public. (b) That this end being accomplished, the corporation sought to perpetuate its monopoly by rendering it difficult or impossible for competitors to go into the business of producing glucose or corn syrup by devising a so-called

1212 COMBINATIONS AND RESTRAINT OF TRADE

profit-sharing scheme, by which it was proposed to give to all those who purchased from the combination a stipulated percentage upon the amount of the purchases made in one year, to be paid at the end of the following year, provided that during such time they dealt with no one else but the combination. While the sum of the percentage thus offered, it was alleged, varied from year to year, nevertheless it was charged that in substance the contract or offer remained the same. The tender to the manufacturing company of a right to participate in the scheme, it was alleged, was first made in 1907 relative to the business done in 1906 in the form of a letter which is in the margin,⁴³ and this offer or asserted contract was continued from year to year. It was further alleged that the scheme proved successful in accomplishing its wrongful purpose since, although subsequently independent concerns engaged in the business of manufacturing glucose or corn syrup, and offered to sell their products at prices less than those charged by the combination, such concerns were virtually driven out of business because those who desired to purchase the products were deterred from buying from them for fear of losing the per-

43— 26 Broadway, New York,
March, 9, 1907.

The D. R. Wilder Mfg. Co., Atlanta,
Ga.

Gentlemen:—

This company recognizing the fact that its own prosperity, in a great measure, is interwoven with the good will and co-operation of its patrons, has decided to adopt a liberal plan of profit sharing with you, in case you shall in the future continue to give us your exclusive patronage.

This company inaugurates such a policy of profit sharing by announcing that it will set aside out of its profits from the manufacture and sale of glucose and grape sugar for the last six months of 1906, an amount equal to 10 cents per hundred pounds on all shipments of glucose and grape sugar (Warner's Anhydre and Bread Sugar excepted)

which shall have been made to you by this company from July 1st to December 31, 1906.

This amount will be paid to you or your successors on December 31, 1907, on condition that for the remainder of the year 1906 and the entire year 1907, you or your successors shall have purchased exclusively from this company or its successors all the glucose and grape sugar required for use in your establishment.

With the assurance of steadfast co-operation of its customers, given in reciprocation for the benefits conferred upon them, this company confidently anticipates a continuance of such profit-sharing distribution annually to the full extent that its earnings may warrant.

Yours very truly,
Corn Products Refining Company.

centage which they would receive from the combination if all their purchases continued to be made from it alone, and moreover because of the dread felt by purchasers that the independents would not be able to resist the overweening and controlling power of the combination. It was moreover alleged that all purchases made by the manufacturing company "contained the following clause in the contract of purchase: 'The goods herein sold are for your own consumption, and not for resale.' "

Charging that the condition which made the payment of the proposed profit-sharing percentage depend upon dealing alone with the combination was void and should be disregarded, the answer asked not only that the prayer for judgment for the purchase price be rejected, but that, treating the failure of the manufacturing company to comply with the condition on which the offer of profit sharing was made as immaterial, there should be a judgment for that company for the percentage of profits on the business for the year 1908.

On motion the answer was stricken out as stating no defense. There was a judgment in the absence of further pleading against the manufacturing company for the price of the goods, as sued for, and rejecting its claim for the percentage of profits. This judgment was affirmed by the court below (11 Ga. App. 588), and because of an assumed failure to give effect to the anti-trust act of Congress this writ of error was prosecuted.

As the context of the answer clearly justified the inference that the sale of the glucose was an interstate transaction, the court below was right in assuming that to be the case, and therefore we put out of view as devoid of merit the contrary suggestion made by the refining company.

Having dealt with the refining company as an existing concern possessing the capacity to sell, speaking generally, the assertion that it had no legal existence, because it was an unlawful combination in violation of the anti-trust act, was irrelevant to the question of the liability of the manufacturing company to pay for the goods, since such defense was a mere collateral attack on the organization of the corporation, which could not be lawfully made.⁴⁴ Besides, considered from the

44—Finch v. Ullman, 105 Mo. 255,
24 Am. St. Rep. 383; Taylor v.
Portsmouth, K. & Y. Street R. Co.,

91 Me. 193, 64 Am. St. Rep. 216;
Smith v. Mayfield, 163 Ill. 447;
Detroit City R. Co. v. Mills, 85 Mich.

point of view of the alleged illegality of the corporation, the attack on its existence was absolutely immaterial because the right to enforce the sale did not involve the question of combination, since, conceding the illegal existence of the corporation making the sale, the obligation to pay the price was indubitable, and the duty to enforce it not disputable. This is true because the sale and the obligations which arose from it depended upon a distinct contract, with reciprocal considerations moving between the parties,—the receipt of the goods on the one hand, and the payment of the price on the other. And this is but a form of stating the elementary proposition that courts may not refuse to enforce an otherwise legal contract because of some indirect benefit to a wrongdoer which would be afforded from doing so, or some remote aid to the accomplishment of a wrong which might possibly result,—doctrines of such universal acceptance that no citation of authority is needed to demonstrate their existence, especially in view of the express ruling in *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, applying them to the identical general question here involved.

The case therefore reduces itself to the question whether the contract of sale was inherently illegal so as to bring it within the also elementary rule that courts will not exert their powers to enforce illegal contracts or to compel wrongdoing. The only suggestion as to the intrinsic illegality of the sale results from the averments of the answer as to the offer of a percentage of profits upon the condition of dealing exclusively with the refining company for the following year, and the clause to the effect that the goods were bought by the manufacturing company for its own use, and not for resale. But we can see no ground whatever for holding that the contract of sale was illegal because of these conditions. In fact, it is not so contended in argument, since substantially the proposition which is relied upon is that, although such stipulations were intrinsically legal, they become illegal as the result of the duty to consider them from the point of view that one of the parties was an illegal combination, interested in inserting such conditions as an efficient means of sustaining its continued wrong-

634; *Mackall v. Chesapeake & O. Co.*, 184 U. S. 540, 46 L. Ed. 679. *Canal Co.*, 94 U. S. 308, 24 L. Ed. (Cited by the court.) 161; *Connolly v. Union Sewer Pipe*

doing, and therefore giving power to accomplish the baneful and prohibited results of its illegal organization,—a duty which, it is urged, results from reason, is commanded by the anti-trust act and the obligation to enforce its provisions, and is required because of a previous decision of this court, enforcing that act (*Continental Wall Paper Co. v. Louis Voight & Sons Co.* 212 U. S. 227, 53 L. ed. 486), unless that decision is to be now qualified or overruled.

In the first place, the contention cannot be sustained consistently with reason. It overthrows the general law. It admits the want of power to assail the existence of a corporate combination as a means of avoiding the duty to pay for goods bought from it, and concedes at the same time the legality of the condition in the sale, and yet proposes, by bringing the two together, to produce a new and strange result, unsupported in any degree by the elements which are brought together to produce it, and conflicting with both.

In the second place, the proposition is repugnant to the anti-trust act. Beyond question, re-expressing what was ancient or existing, and embodying that which it was deemed wise to newly enact, the anti-trust act was intended in the most comprehensive way to provide against combinations or conspiracies in restraint of trade or commerce, the monopolization of trade or commerce, or attempts to monopolize the same. *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912 D, 734; *United States v. American Tobacco Co.* 221 U. S. 106, 55 L. ed. 663. In other words, founded upon broad conceptions of public policy, the prohibitions of the statute were enacted to prevent not the mere injury to an individual which would arise from the doing of the prohibited acts, but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented, and hence not only the prohibitions of the statute, but the remedies which it provided, were coextensive with such conceptions. Thus the statute expressly cast upon the Attorney General of the United States the responsibility of enforcing its provisions, making it the duty of the district attorneys of the United States in their respective districts, under his authority and direction, to act concerning any violations of the law. And in addition, evidently contemplating that the official

unity of initiative which was thus created to give effect to the statute required a like unity of judicial authority, the statute in express terms vested the circuit court of the United States with "jurisdiction to prevent and restrain violations of this act," and besides expressly conferred the amplest discretion in such courts to join such parties as might be deemed necessary, and to exert such remedies as would fully accomplish the purposes intended. Act of July 2, 1890, chap. 647, 26 Stat. at L. 209, Comp. Stat. 1913, § 8820.

It is true that there are no words of express exclusion of the right of individuals to act in the enforcement of the statute, or of courts generally to entertain complaints on that subject. But it is evident that such exclusion must be implied for a twofold reason: First, because of the familiar doctrine that "where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes." *Farmers' & M. Nat. Bank v. Dearing*, 91 U. S. 29, 35, 23 L. ed. 196, 199; *Barnet v. Muncie Nat. Bank*, 98 U. S. 555, 25 L. ed. 212; *Oates v. First Nat. Bank*, 100 U. S. 239, 25 L. ed. 580; *Stephens v. Monongahela Nat. Bank*, 111 U. S. 197, 28 L. ed. 399; *Tennessee Coal, I. & R. Co. v. George*, 233 U. S. 354, 359, 58 L. ed. 997, 999, L. R. A. 1915, —; Second, because of the destruction of the powers conferred by the statute, and the frustration of the remedies which it creates, which would obviously result from admitting the right of an individual, as a means of defense to a suit brought against him on his individual and otherwise inherently legal contract, to assert that the corporation or combination suing had no legal existence in contemplation of the anti-trust act. This is apparent since the power given by the statute to the Attorney General is inconsistent with the existence of the right of an individual to independently act, since the purpose of the statute was where a combination or organization was found to be illegally existing to put an end to such illegal existence for all purposes, and thus protect the whole public,—an object incompatible with the thought that such a corporation should be treated as legally existing for the purpose of parting with its property by means of a contract of sale, and yet be held to be civilly dead for the purpose of recovering the price of such sale, and then, by a

failure to provide against its future exertion of power, be recognized as virtually resurrected and in possession of authority to violate the law. And in a twofold sense these considerations so clearly demonstrate the conflict between the statute and the right now asserted under it as to render it unnecessary to pursue that subject further. In the first place, because they show in addition how completely the right claimed would defeat the jurisdiction conferred by the statute on the courts of the United States,—a jurisdiction evidently given, as we have seen, for the purpose of making the relief to be afforded by a finding of illegal existence as broad as would be the necessities resulting from such finding. In the second place, because the possibility of the wrong to be brought about by allowing the property to be obtained under a contract of sale without enforcing the duty to pay for it, not upon the ground of the illegality of the contract of sale, but of the illegal organization of the seller, additionally points to the causes which may have operated to confine the right to question the legal existence of a corporation or combination to public authority sanctioned by the sense of public responsibility, and not to leave it to individual action, prompted, it may be, by purely selfish motives.

As, from these considerations, it results not only that there is no support afforded to the proposition that the anti-trust act authorizes the direct or indirect suggestion of the illegal existence of a corporation as a means of defense to a suit brought by such corporation on an otherwise inherently legal and enforceable contract, but, on the contrary, that the provisions of the act add cogency to the principles of general law on the subject, and therefore make more imperative the duty not directly or indirectly to permit such a defense to a suit to enforce such a contract, we put that subject out of view and come to the only remaining inquiry, the alleged effect of the previous ruling in the *Continental Wall Paper Case*, *supra*.

It is to be observed in considering that contention that the general rule of law which we have stated is not apparently questioned in the argument, and the controlling influence of the ruling in the *Connolly Case*, *supra*, if here applicable, is not denied, but the contention is that the general law is not applicable, and the *Connolly Case* is inapposite because of an

exception which was ingrafted upon the general law by the ruling in the Continental Wall Paper Case under which it is said this case comes. While it clearly appears that this is the contention, it is difficult to precisely fix the ground upon which it is rested. But as the rule of general law which, under ordinary circumstances, does not permit the existence of a corporation to be indirectly attacked, is not assailed, and as it is not asserted that, irrespective of the illegal organization of the corporation, the contract of sale was inherently unlawful, it follows that the proposition is the one which we have already, in another aspect, disposed of; that is, that the sale and its conditions, although inherently legal, become illegal by considering the illegal corporation and the aid to be afforded to its wrongful purposes by the conditions which formed a part of the sale. But, in substance, this only assumes that it was held in the Continental Wall Paper Case that that which was inherently legal can be rendered illegal by considering in connection with it something which there is no right to consider at all. But it is apparent on the face of the opinion in the Continental Wall Paper Case that it affords no ground for the extreme and contradictory conclusion thus deduced from it, since the ruling in that case was based not upon any supposed right to import into a legal and valid contract elements of wrong which there was no right to consider, but was rested exclusively upon elements of illegality inhering in the particular contract of sale in that case, which elements of illegality may be thus summarized: (a) the relations of the contracting parties to the goods sold, (b) the want of real ownership in the seller, (c) the peculiar obligations which were imposed upon the buyer, and (d) the fact that to allow the nominal seller to enforce the payment of the price would have been, in and of itself, directly to sanction and give effect to a violation of the anti-trust act inhering in the sale. It is not necessary to analyze the facts and issues in the case for the purpose of pointing out how completely they are covered by the statement just made, because the opinion of the court and the reasons stated by the members of the court who dissented without more make that fact perfectly clear. Indeed, not only does this statement make clear the fact that there is no conflict between the Connolly Case and the Continental Wall Paper Case, but it also

establishes that both cases, the first directly, and the other by a negative pregnant, demonstrate the want of merit in the contentions here insisted upon.

It only remains to say that we think it requires nothing but statement to demonstrate that, in view of the facts which we have recited and the legal principles which we have applied to them, no error was committed by the court below in refusing to give to the defendant a judgment for its alleged share of the profits for the year 1908, when it was expressly admitted that the condition upon which the offer of a right to a participation in the profits was rested, or the contract (if there was a contract to that effect) was based, had not been complied with.

Affirmed.

PIDCOCK v. HARRINGTON

(United States Circuit Court, Southern District of New York,
1894. 64 Fed. 821.)

This is a suit in equity against the above-named defendant, and a number of others, praying for an injunction and an accounting on the ground that the defendants have conspired to ruin complainant's business as a commission merchant and dealer in live stock. The bill alleges that the defendants have ceased dealing with the complainant and have threatened to cease dealing with people who deal with him. The action is founded upon the act of congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (26 Stat. 209).

Defendants demurred to the bill.

COXE, District Judge. At the argument the counsel for the complainant was asked whether he sought to maintain this action under the general equity principles of the common law or under the provisions of the act of July 2, 1890. He answered that it was founded solely upon the statute. It is unnecessary, therefore, to discuss the proposition whether or not the action can be maintained independently of the statute. The demurrer challenges the jurisdiction of this court to maintain, under the act in question, a bill in equity filed by a private

individual and his solicitor. It is clear that the right to maintain such a suit is not expressly conferred by the act. Indeed, such right is, by implication, denied—First, because a private person is given (section 7) the right to maintain an action at law; and, second, the district attorneys of the United States, under the direction of the attorney general (section 4), are charged with the duty of commencing suits in equity. If it were the intention of the lawmakers to vest in every irresponsible individual, who may deem himself aggrieved, the right to invoke the drastic and far-reaching remedies conferred by the act, is it not reasonable to suppose that they would have said so in unambiguous terms? The first three sections are penal statutes. They give no civil remedy. Section 4 vests the right to institute proceedings in equity in the district attorneys of the United States, and, together with section 5, prescribes the procedure in such suits. Section 6 provides for the seizure and forfeiture to the United States of property illegally owned under the provisions of the act. So far, then, the act is a public act providing no private remedy. If it ended with section 6 there would probably be no pretense that it sanctioned a suit like the one at bar. What follows, however, in no way strengthens the complainant's position. The only section which gives a private remedy is the seventh, which is as follows:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

But for this section no private person would have any standing in court, and as the only right conferred by it is the right to sue for damages in a court of law, it follows that the point presented by the demurrer is well founded. The precise question was decided in favor of the views here expressed in *Blindell v. Hagan*, 54 Fed. 40, affirmed 6 C. C. A. 86.

*The demurrer is allowed.*⁴⁵

45—See also *Blindell v. Hagan*, 54 Fed. 40 (where injunction granted on another ground); *Hagan v. Blindell* (same); *Greer Mills & Co.*

AMES v. AMERICAN TELEPHONE & TELEGRAPH CO.

(United States Circuit Court, District of Massachusetts, 1909.
166 Fed. 820.)

BROWN, District Judge. The declaration is framed in reliance upon the Sherman anti-trust act (Act July 2, 1890, c. 647, § 1, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), and claims threefold damages under that act.

The declaration avers in effect that the plaintiff is the owner of shares of the capital stock of the Telephone, Telegraph & Cable Company of America, organized to operate an independent telephone system throughout the United States; that the defendant, the American Telephone & Telegraph Company, secured control of the Telephone, Telegraph & Cable Company by the purchase of shares of its stock. The principal allegation requiring consideration is the following:

“The plaintiff avers that the defendant purchased said shares and secured said control for the purpose of preventing the free operation of competition in the interstate telephone traffic and commerce which said company had planned to carry on, and in the attempt to monopolize such commerce; that said cable company has since been managed by the nominees of the defendant and its agent, the said Morse, not for the purpose of developing the business for which said company was organized, but for the purpose of preventing said company from doing business, and thus suppressing and smothering the competition which it would otherwise cause to the business of the defendant, until now the company is in the hands of a receiver; and that by the exercise of its control of said cable company the defendant has, in fact, since monopolized such interstate telephone commerce.”

It is alleged that the plaintiff's injury was rendering worthless his shares of stock of the cable company. The principal question upon demurrer is whether the declaration sets forth

v. Stoller, 77 Fed. 1 (where question was whether a person not residing in the district could be made a party); Southern Indiana Exp. Co. v. United States Exp. Co., 88 Fed. 659 (affirmed, 92 Fed. 1022,

without further opinion); National Fireproofing Co. v. Mason Builders' Ass'n, 169 Fed. 259 (*ante*, p. 552) (where it was held that no principle of the common law was violated).

any injury to the plaintiff resulting in a special damage peculiar to himself and distinguishable in kind from that which he shares with all other shareholders as a result of an injury to the corporation in its business or property.

Assuming merely for purposes of decision upon demurrer that the declaration alleges a violation of the Sherman act, and that it properly alleges consequent damage, I am of the opinion that the injury set forth is to the corporation, for which the corporation alone can maintain an action at law under the Sherman act. Section 7 of that act gives a right to recover threefold damages to—

“any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act,” etc.

The business which it is alleged was injured was that of the Telephone, Telegraph & Cable Company of America, and not of the plaintiff. Can it be said that the injury which the plaintiff has suffered by the depreciation of the value of his shares constitutes such an injury in his property that it is distinguishable from the injury to the corporation? The right of a stockholder to maintain an action at law for injury suffered by the corporation was carefully considered by Chief Justice Shaw, in *Smith v. Hurd et al.*, 12 Mete. (Mass.) 371, 46 Am. Dec. 690. In this opinion it is recognized that to the extent of his separate and peculiar interest a stockholder may maintain his separate and special action. It is said, however:

“But an injury done to the stock and capital, by negligence or misfeasance, is not an injury to such separate interest, but to the whole body of stockholders in common. It is like the case of a common nuisance, where one who suffered a special damage, peculiar to himself, and distinguishable in kind from that which he shares in the common injury, may maintain a special action.”

A later case, *Converse v. United Shoe Machinery Company*, 185 Mass. 422, reaffirms the doctrine of *Smith v. Hurd*, and is in point upon the question whether this declaration sets forth any special injury to the plaintiff which is distinguishable from the alleged injury to the corporation. The language of the court is as applicable, I think, to the declaration in the present case as to the similar declaration then before the court:

"All the wrongs done or intended, set out in the declaration, are wrongs against the corporation in which the plaintiff is a stockholder, and except through the corporation they have no relation to the plaintiff. She was not affected by the defendant's conduct, except as every other stockholder was affected. Against her as an individual there was no conspiracy, and against her as an individual no wrong was done directly. There is no direct legal privity between her individually, or as a stockholder, and these defendants."

The Sherman act does not by its terms affect the question whether an injury is in legal contemplation an injury to the corporation or an injury to the stockholder. This question must be determined upon ordinary principles of law. There can be little doubt that the ordinary principle of representation of the stockholders by the corporation is as applicable to a violation of the Sherman act as to any other violation of law. There is no indication of an intention of Congress to subject a defendant to independent suits by a multitude of stockholders for an act for which the statute affords redress to the corporation itself.

The corporation has a right of action, and to so interpret the act as to confer a right of action upon the stockholder also, upon the present declaration, would be in effect to subject the defendant not merely to treble damages, but to sextuple damages, for the same unlawful act. The plaintiff's brief does not make satisfactory answer to this point. It is suggested by the plaintiff:

"If the corporation should also at some later time sue and recover, the fact of the plaintiff's earlier recovery should be considered in estimating the damages to be paid to the corporation."

The declaration alleges that the cable company is now in the hands of a receiver. It follows that upon recovery of damages for an injury to the corporation the fund belongs to the receiver for application to the obligations of the corporation. These obligations take precedence over the interest of the shareholder. The prior recovery by a shareholder, if permitted to diminish recovery by the receiver, would result in depriving creditors of the corporation, if there are any, of the assets properly belonging to them. Moreover, the assets of the cor-

poration are subject to disposal by proper corporate action, and the individual stockholder has no rights inconsistent with this right of the corporation.

The allegation of damage to the plaintiff is that :

"He has been greatly injured in his business and property, in that his said shares of stock which were worth, as the plaintiff avers, \$15 per share, at the time of purchase of stock by the defendant, have now been rendered worthless."

Plaintiff argues that, as the declaration contains no averment that the company lost its assets, it is perfectly conceivable that the stock of the company might become practically worthless, though its assets were not directly affected, if its officers insisted upon a policy of doing no business and paying no dividends.

It is further suggested that :

"If absolute injustice is not to be done by denying this plaintiff the right to maintain his suit, the court is required to rule that in no conceivable way and under no conceivable form of proof could he show that the value of his stock was affected in the slightest degree differently from the way that damage was done to the corporation. If there is any difference at all in the nature of the damage, then the demurrer should be overruled, and the case should be tried on issues of fact under the proper guidance of the court."

The possibility that at the trial proof may be introduced of an injury other than that alleged in the declaration is not a good reason for overruling the demurrer. The only injury set forth is an injury to the corporation. No facts are stated which show an injury to the plaintiff distinct from that to the corporation, and the possibility of proof thereof at a trial, therefore, cannot be considered upon demurrer. Such a general averment as that "the plaintiff has been greatly injured in his business and property" cannot support the introduction of testimony showing a different cause of action from that of which the defendant is given notice by the declaration. The plaintiff must set out the facts from which it appears that he has suffered a peculiar and individual injury.

Granting that the value of corporate stock is dependent, not only upon assets in possession, but upon the expectation of profits to be realized through conduct of the corporate busi-

ness, the shareholder has no special interest, distinct from that of the corporation, in such profits. If damages are recoverable for the destruction of provable future profits, the corporation or its receiver, and not the stockholder, would be entitled to such damages. *Porter v. Sabin*, 149 U. S. 473, 37 L. Ed. 815.

It is not necessary, however, to speculate as to the possibilities and as to the conceivable right of stockholders to maintain individual actions. It is enough to say that the wrongs here alleged are to the corporation, that to admit any other line of proof would be to go outside of the declaration, and that the proper guidance of the court should be exercised, not in distinguishing relevant and irrelevant issues at the trial, but by rulings on demurrer which will determine the orderly course of the trial.

The facts in the case of *Metcalf v. American School Furniture Company* (C. C.) 108 Fed. 909, are substantially different. There is no careful consideration in that case of the question of representation of the stockholder by the corporation in suits under the Sherman anti-trust act. The decision is confined to the ground of multifariousness. The affirmation of this decision by the Circuit Court of Appeals in 51 C. C. A. 599, amounts to nothing more than an affirmation of the decision that the claim for triple damages under the Sherman act could not be joined with a stockholders' bill. The court observes that:

"Section 7 of the federal act of 1890 is declaratory of a common-law right which existed in favor of parties injured by wrongs enumerated in other sections of that act, and confers jurisdiction to seek a remedy, and with treble damages, in a federal tribunal. The character of the right of action is in no way changed, and still remains one in tort."

This is inconsistent with the contention that the Sherman act has the effect of changing the ordinary rule that the corporation represents the stockholder in wrongs done to the corporation. The plaintiff does not contend that the right of action for treble damages is given to the stockholder and denied to the corporation. A construction of the act which makes the defendant liable to sextuple damages is certainly to be avoided. The asserted right of the stockholder is inconsistent

with the right of the corporation to maintain suit upon the facts alleged in the declaration.

In *Pennsylvania Sugar Refining Company v. American Sugar Refining Company* (C. C.) 160 Fed. 144, a similar action was brought, not by a stockholder, but by the corporation. The complaint was dismissed by the Circuit Court on the authority of *United States v. E. C. Knight Company*, 156 U. S. 1, 39 L. Ed. 325. A recent press report states, however, that this decision was reversed by the United States Circuit Court of Appeals for the Second Circuit and the right of the corporation to maintain suit was apparently affirmed. 166 Fed. 254.

The plaintiff contends that, if it be true that the corporation and not the stockholder is the proper party to bring suit, it then follows that the stockholder has no remedy at all, for the reason that several cases have decided that a private individual cannot sue in equity under the Sherman act, and that the only remedy is at law. The cases of *Pideock v. Harrington* (C. C.) 64 Fed. 821, *Gulf, C. & S. F. Ry. Co. v. Miami S. S. Co.*, 30 C. C. A. 142, and *Southern Indiana Ext. Co. v. U. S. Exp. Co.* (C. C.) 88 Fed. 659, do not touch the question of the rights in equity of a stockholder upon a refusal of a corporation to maintain an action at law for damages under the Sherman act. A bill in equity based upon this ground would be substantially different from the suits in equity above referred to. The possibility that the stockholder might be deprived of some right through the failure or refusal of the corporation to take the proper steps to enforce its rights is not a sufficient reason for disregarding the doctrine of *Smith v. Hurd*, and *Converse v. United States Shoe Machinery Company*. See *Porter v. Sabin*, 149 U. S. 473, 37 L. Ed. 815.

The cable company being in the hands of a receiver, there should be little practical difficulty in working out the stockholder's right through directions to the receiver as to suits upon causes of action belonging to the corporation.

The defendant contends, further, that the declaration shows no breach of the Sherman act resulting in damage to any one. A decision of this question involves a careful consideration of a number of decisions, some of which were not discussed at the argument.

I am of the opinion that a consideration of this point is unnecessary, in view of what seems to me the vital objection to the maintenance of a suit by a stockholder upon the present declaration.

Demurrer sustained.

CHAPTER III

THE CLAYTON ACT

An Act To supplement existing laws against unlawful restraints and monopolies, and for other purposes. [Public—No. 212—63d Congress.] [H. R. 15657.]

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That "antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen; and also this Act.

"Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: *Provided,* That nothing in this Act contained shall apply to the Philippine Islands.

The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

SEC. 2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided*, That nothing herein contained shall prevent discrimination in prices between purchasers of commodities on account of differences in the grade, quality or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade.

SEC. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding

may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

SEC. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

SEC. 5. That a final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, This section shall not apply to consent judgments or decrees entered before any testimony has been taken: *Provided further*, This section shall not apply to consent judgments or decrees rendered in criminal proceedings or suits in equity, now pending, in which the taking of testimony has been commenced but has not been concluded, provided such judgments or decrees are rendered before any further testimony is taken.

Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof.

SEC. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the

members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

SEC. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital or two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed

by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other such common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

SEC. 8. That from and after two years from the date of the approval of this Act no person shall at the same time be a director or other officers or employee of more than one bank, banking association or trust company, organized or operating under the laws of the United States, either of which has deposits, capital, surplus, and undivided profits aggregating more than \$5,000,000; and no private banker or person who is a director in any bank or trust company, organized and operating under the laws of a State, having deposits, capital, surplus, and undivided profits aggregating more than \$5,000,000, shall be eligible to be a director in any bank or banking association organized or operating under the laws of the United States. The eligibility of a director, officer, or employee under the foregoing provisions shall be determined by the average amount of deposits, capital, surplus, and undivided profits as shown in the official statements of such bank, banking association, or trust company filed as provided by law during the fiscal year next preceeding the date set for the annual election of directors, and when a director, officer, or employee has been elected or selected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter under said election or employment.

No bank, banking association or trust company, organized

or operating under the laws of the United States, in any city or incorporated town or village of more than two hundred thousand inhabitants, as shown by the last preceding decennial census of the United States, shall have as a director or other officer or employee any private banker or any director or other officer or employee of any other bank, banking association or trust company located in the same place: *Provided*, That nothing in this section shall apply to mutual savings banks not having a capital stock represented by shares: *Provided further*, That a director or other officer or employee of such bank, banking association, or trust company may be a director or other officer or employee of not more than one other bank or trust company organized under the laws of the United States or any State where the entire capital stock of one is owned by stockholders in the other: *And provided further*, That nothing contained in this section shall forbid a director of class A of a Federal reserve bank, as defined in the Federal Reserve Act from being an officer or director or both an officer and director in one member bank.

That from and after two years from the date of the approval of this Act no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than \$1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies and common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. The eligibility of a director under the foregoing provision shall be determined by the aggregate amount of the capital, surplus, and undivided profits, exclusive of dividends declared but not paid to stockholders, at the end of the fiscal year of said corporation next preceding the election of directors, and when a director has been elected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter.

When any person elected or chosen as a director or officer

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or selected as an employee of any bank or other corporation subject to the provisions of this Act is eligible at the time of his election or selection to act for such bank or other corporation in such capacity his eligibility to act in such capacity shall not be affected and he shall not become or be deemed amenable to any of the provisions hereof by reason of any change in the affairs of such bank or other corporation from whatsoever cause, whether specifically excepted by any of the provisions hereof or not, until the expiration of one year from the date of his election or employment.

SEC. 9. Every president, director, officer or manager of any firm, association or corporation engaged in commerce as a common carrier, who embezzles, steals, abstracts or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property or assets of such firm, association or corporation, arising or accruing from, or used in, such commerce, in whole or in part, or willfully or knowingly converts the same to his own use or to the use of another, shall be deemed guilty of a felony and upon conviction shall be fined not less than \$500 or confined in the penitentiary not less than one year nor more than ten years, or both, in the discretion of the court.

Prosecutions hereunder may be in the district court of the United States for the district wherein the offense may have been committed.

That nothing in this section shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof; and a judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution hereunder for the same act or acts.

SEC. 10. That after two years from the approval of this Act no common carrier engaged in commerce shall have any dealings in securities, supplies or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than \$50,000, in the aggregate, in any one year, with another corporation, firm, partnership or association when the said common carrier shall have upon its board of directors or as its president, manager or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time

a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. No bid shall be received unless the name and address of the bidder or the names and addresses of the officers, directors and general managers thereof, if the bidder be a corporation, or of the members, if it be a partnership or firm, be given with the bid.

Any person who shall, directly or indirectly, do or attempt to do anything to prevent anyone from bidding or shall do any act to prevent free and fair competition among the bidders or those desiring to bid shall be punished as prescribed in this section in the case of an officer or director.

Every such common carrier having any such transactions or making any such purchases shall within thirty days after making the same file with the Interstate Commerce Commission a full and detailed statement of the transaction showing the manner of the competitive bidding, who were the bidders, and the names and addresses of the directors and officers of the corporations and the members of the firm or partnership bidding; and whenever the said commission shall, after investigation or hearing, have reason to believe that the law has been violated in and about the said purchases or transactions it shall transmit all papers and documents and its own views or findings regarding the transaction to the Attorney General.

If any common carrier shall violate this section it shall be fined not exceeding \$25,000; and every such director, agent, manager or officer thereof who shall have knowingly voted for or directed the act constituting such violation or who shall have aided or abetted in such violation shall be deemed guilty of a misdemeanor and shall be fined not exceeding \$5,000, or confined in jail not exceeding one year, or both, in the discretion of the court.

SEC. 11. That authority to enforce compliance with sections two, three, seven and eight of this Act by the persons respec-

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tively subject thereto is hereby vested: in the Interstate Commerce Commission where applicable to common carriers, in the Federal Reserve Board where applicable to banks, banking associations and trust companies, and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:

Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission or board requiring such person to cease and desist from the violation of the law so charged in said complaint. Any person may make application, and upon good cause shown may be allowed by the commission or board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission or board. If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission or board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

If such person fails or neglects to obey such order of the

commission or board while the same is in effect, the commission or board may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission or board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission or board. The findings of the commission or board as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission or board, the court may order such additional evidence to be taken before the commission or board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission or board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission or board be set aside. A copy of such peti-

tion shall be forthwith served upon the commission or board, and thereupon the commission or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission or board as in the case of an application by the commission or board for the enforcement of its order, and the findings of the commission or board as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission or board shall be exclusive.

Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or board or the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the antitrust Acts.

Complaints, orders, and other processes of the commission or board under this section may be served by anyone duly authorized by the commission or board, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person; or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return postoffice receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

SEC. 12. That any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

SEC. 13. That in any suit, action, or proceeding brought by or on behalf of the United States subpoenas for witnesses who are required to attend a court of the United States in any judicial district in any case, civil or criminal, arising under the antitrust laws may run into any other district: *Provided*, That in civil cases no writ of subpoena shall issue for witnesses living out of the district in which the court is held at a greater distance than one hundred miles from the place of holding the same without the permission of the trial court being first had upon proper application and cause shown.

SEC. 14. That whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding \$5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court.

SEC. 15. That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned whether they reside in the district in which the court is held or not,

and subpoenas to that end may be served in any district by the marshal thereof.

SEC. 16. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damages is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

SEC. 17. That no preliminary injunction shall be issued without notice to the opposite party.

No temporary restraining order shall be granted without notice to the opposite party unless it shall clearly appear from specific facts shown by affidavit or by the verified bill that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every such temporary restraining order shall be indorsed with the date and hour of issuance, shall be forthwith filed in the clerk's office and entered of record, shall define the injury and state why it is irreparable and why the order was granted without notice, and shall by its terms expire within such time after entry, not to exceed ten days, as the court or judge may fix, unless within the time so fixed the order is extended for a like period for good cause shown, and the reasons for such extension shall be entered of record. In case a temporary restraining order shall be granted without notice in the contingency specified, the matter of the issuance

of a preliminary injunction shall be set down for a hearing at the earliest possible time and shall take precedence of all matters except older matters of the same character; and when the same comes up for hearing the party obtaining the temporary restraining order shall proceed with the application for a preliminary injunction, and if he does not do so the court shall dissolve the temporary restraining order. Upon two days notice to the party obtaining such temporary restraining order the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require.

Section two hundred and sixty-three of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, is hereby repealed.

Nothing in this section contained shall be deemed to alter, repeal, or amend section two hundred and sixty-six of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

SEC. 18. That, except as otherwise provided in section 16 of this Act, no restraining order or interlocutory order of injunction shall issue, except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby.

SEC. 19. That every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained, and shall be binding only upon the parties to the suit, their officers, agents, servants, employees, and attorneys, or those in active concert or participating with them, and who shall, by personal service or otherwise, have received actual notice of the same.

SEC. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the

judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value: or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

SEC. 21. That any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any State in which the act was committed, shall be proceeded against for his said contempt as hereinafter provided.

SEC. 22. That whenever it shall be made to appear to any district court or judge thereof, or to any judge therein sitting, by the return of a proper officer on lawful process, or upon the affidavit of some credible person, or by information filed by any district attorney, that there is reasonable ground to believe that any person has been guilty of such contempt, the court or judge thereof, or any judge therein sitting, may issue a rule requiring the said person so charged to show cause upon a day certain why he should not be punished therefor, which rule, together with a copy of the affidavit or information, shall be served upon the person charged, with sufficient promptness to enable him to prepare for and make return to the order at the time fixed therein. If upon or by such return, in the judgment of the court, the alleged contempt be not sufficiently purged, a trial shall be directed at a time and place fixed by the court: *Provided, however,* That if the accused, being a natural person, fail or refuse to make return to the rule to show cause, an attachment may issue against his person to compel an answer, and in case of his continued failure or refusal, or if for any reason it be impracticable to dispose of the matter on the return day, he may be required to give reasonable bail for his attendance at the trial and his submission to the final judgment of the court. Where the accused is a body corporate, an attachment for the sequestration of its property may be issued upon like refusal or failure to answer.

In all cases within the purview of this Act such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers, may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information.

If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant

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or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of \$1,000, nor shall such imprisonment exceed the term of six months: *Provided*, That in any case the court or a judge thereof may, for good cause shown, by affidavit or proof taken in open court or before such judge and filed with the papers in the case, dispense with the rule to show cause, and may issue an attachment for the arrest of the person charged with contempt; in which event such person, when arrested, shall be brought before such court or a judge thereof without unnecessary delay and shall be admitted to bail in a reasonable penalty for his appearance to answer to the charge or for trial for the contempt; and thereafter the proceedings shall be the same as provided herein in case the rule had issued in the first instance.

SEC. 23. That the evidence taken upon the trial of any persons so accused may be preserved by bill of exceptions, and any judgment of conviction may be reviewed upon writ of error in all respects as now provided by law in criminal cases, and may be affirmed, reversed, or modified as justice may require. Upon the granting of such writ of error, execution of judgment shall be stayed, and the accused, if thereby sentenced to imprisonment, shall be admitted to bail in such reasonable sum as may be required by the court, or by any justice, or any judge of any district court of the United States or any court of the District of Columbia.

SEC. 24. That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one of this Act, may be punished in conformity to the usages at law and in equity now prevailing.

SEC. 25. That no proceeding for contempt shall be instituted against any person unless begun within one year from the

date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts; but nothing herein contained shall affect any proceedings in contempt pending at the time of the passage of this Act.

SEC. 26. If any clause, sentence, paragraph, or part of this Act shall, for any reason, be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not effect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

Approved, October 15, 1914.

CHAPTER IV

EFFECT OF PATENTS AND COPYRIGHTS

BEMENT v. NATIONAL HARROW CO.

(Supreme Court of United States, 1902. 186 U. S. 70.)

Statement by MR. JUSTICE PECKHAM:

This is a writ of error to the supreme court of the state of New York, to which court the record had been remitted after a decision of the case by the court of appeals. The action was brought by the plaintiff below, the defendant in error here, a corporation, to recover the amount of liquidated damages arising out of an alleged violation by the defendant below, the plaintiff in error here, also a corporation, of certain contracts executed between the parties in relation to the manufacture and sale of what are termed in the contracts "float spring tooth harrows," their frames, and attachments applicable thereto, under letters patent owned by the plaintiff. The action was also brought to restrain the future violation of such contracts, and to compel their specific performance by the defendant. The case was tried before a referee pursuant to the statute of New York providing therefor, and he ordered judgment in favor of the plaintiff for over \$20,000, besides enjoining the defendant from violating its contract with the plaintiff, and directing their specific performance as continuing contracts. This judgment was reversed by the appellate division of the supreme court, and an order made granting a

1—"Nor is the defendant's contention that the monopoly formed is authorized by the Federal statute [protecting patents] a justification of these contracts. If these contracts were limited to the life-time of these patents, the argument should not be dismissed without a

serious consideration. But when the parties have assumed to contract for 50 years beyond the possible life-time of any of these patents, it is clear that the Federal law has given no right to such monopoly." Per Smith, J., in *Strait v. National Harrow Co.*, 18 N. Y. Supp. 224, 234.

new trial, but on appeal from such order the court of appeals reversed it and affirmed the original judgment. The defendant brings the case here by writ of error.

The particular character of the action appears from the pleadings. The complaint, after alleging the incorporation of both parties to the action, the plaintiff in New Jersey and the defendant in Michigan, averred that about April 1, 1891, the plaintiff's assignor, a New York corporation, entered with the defendant into certain license contracts, called therein Exhibits A and B. The substance of contract A is as follows: It stated that the plaintiff was the owner of certain letters patent of the United States, which had been issued to other parties and were then owned by the plaintiff, for improvements relating to float spring tooth harrows, harrow frames, and attachments applicable thereto, eighty-five of which patents were enumerated; and that the defendants desired to acquire the right to use in its business of manufacturing at Lansing, in the state of Michigan, and to sell throughout the United States, under such patents or some one or more of them, and under all other patented rights owned or thereafter acquired by the plaintiff, which applied to and embraced the peculiar construction employed by the defendant, during the term of such patents, or either or any thereof, applicable to and embracing such construction. The plaintiff then, in and by such contract, gave and granted to the defendant the license and privilege of using the rights under those patents in its business of manufacturing, marketing, and vending to others to be used, float spring tooth harrows, float spring tooth harrow frames without teeth, and attachments applicable thereto; a sample of the harrow frames and attachments the defendant was licensed to manufacture and sell, being (as stated) in the possession of the treasurer of the plaintiff, and marked and numbered as set forth in schedule A, which was made a part of the license. The license was granted upon the terms therein set forth, which were as follows:

- (1) The defendant was to pay a royalty of \$1 for each float spring tooth harrow or frame sold by it pursuant to the license, to be paid to the plaintiff at its office in the city of Utica, in the State of New York.

- (2) The defendant was to make verified reports of its busi-

ness each month and mail them to the plaintiff, and the defendant agreed that it would not ship these harrows to any person, firm, or corporation to be sold on commission, or allow any rebate or reduction from the price or prices fixed in the license, except to settle with an insolvent debtor for harrows previously sold and delivered.

(3) The defendant agreed that it would not during the continuance of the license sell its products manufactured under the license at a less price or on more favorable terms of payment and delivery to the purchasers than was set forth in schedule B, which was made a part of the license, except as thereafter provided.

(4) The plaintiff reserved the right to decrease the selling price and to make the terms of payment and delivery more favorable to the purchasers, and it might reduce the royalty on the harrows manufactured under the license.

(5) The plaintiff agreed to furnish license labels to the defendant, which were to be affixed to each article sold, and the amount of 10 cents paid for each of such labels was to be credited and allowed on the royalty paid by the defendant at the time of such payment.

(6) The defendant agreed that it would not, during the continuance of the license, be directly or indirectly engaged in the manufacture or sale of any other float spring tooth harrows, etc., than those which it was licensed to manufacture and make under the terms of the license, except such as it might manufacture and furnish another licensee of the National Harrow Company, and then only such constructions thereof as such other licensee should be licensed by the plaintiff to manufacture and sell, except such other style and construction as it might be licensed to manufacture and sell by the plaintiff.

(7) The defendant agreed to pay to the plaintiff for each and every of the articles sold contrary to the strict terms and provisions of the license, the sum of \$5, which sum was thereby agreed upon and fixed as liquidated damages.

(8) The defendant agreed not to, directly or indirectly, in any way, contest the validity of any patent applicable to and embracing the construction which the defendant was licensed to manufacture, or which it might manufacture for another licensee, which such other licensee was itself licensed to manu-

facture or sell, or the reissues thereof, and no act of either party should invalidate this admission. The defendant also agreed not to alter or change the construction of the float spring tooth harrows, float spring tooth harrow frames without teeth, or attachments applicable thereto, which it was authorized to manufacture and sell under the license, in any part or portions thereof which embody any of the inventions covered by the letters patent, or any of them, or any reissues thereof.

(9) The plaintiff agreed that after the license was delivered it would not grant licenses, or let to any other person, the right to manufacture the articles named, of the peculiar style and construction or embodying the peculiar features thereof used by the defendant, as illustrated and embodied in the sample harrow then placed in the possession of the treasurer of the plaintiff, and referred to in schedule A of the license.

(10) Nothing contained in the license was to authorize the defendant to manufacture or vend, directly or indirectly, any other or different style of harrow than duplicates of such samples as had been deposited by it with the plaintiff, and such as were embraced in the license.

(11) Any departure from the terms of the license might at the option of the plaintiff be treated as a breach of the license, and the licensee might be treated as an infringer, or the plaintiff might restrain the breach thereof in a suit brought for that purpose and obtain an injunction, the licensee waiving any right of trial by jury; such remedy was to be in addition to the liquidated damages already provided for.

(12) The termination of the license by the plaintiff was not to release the defendant from its obligation to pay for articles sold up to the termination of the license.

(13) The plaintiff agreed to defend the defendant in any suit brought for an alleged infringement.

(14) No royalties were to be paid for articles exported for use in a foreign country.

(15) The license was personal to the licensee, and not assignable, except to the successors of the defendant in the same place and business, without the written consent of the plaintiff, nor were the royalties or other sums specified to cease to be paid under any circumstances, except under the conditions named in the license, during the continuance thereof.

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(16) The parties agreed that the license should continue during the term of the patent or patents applicable to the license, and during the term of any reissues thereof.

(17) The place of the performance of the agreement was the city of Utica, New York, and the agreement was to be construed and the rights of the parties thereunder determined according to the laws of New York.

(18) The consideration of the contract or license was \$1, paid by each of the parties to the other, and the covenants contained therein to be performed by the other, and it applied to and bound the parties thereto, their successors, heirs, and assigns.

Schedule A, which followed, contained a description of the particular kinds of harrow which the defendant was authorized to make and sell under the license. Schedule B contained a statement of the prices and terms of sale under the license, and it was therein stated that "a maximum discount of 42 per cent may be allowed on sales of harrows, frames, and teeth in the following territory: All of the New England states, also states of New York, Pennsylvania, New Jersey, Delaware, Maryland, Virginia, and West Virginia. A maximum discount of 45 per cent may be allowed on all sales in the territory throughout the United States not mentioned above."

This contract or license was signed by the president of the National Harrow Company for the plaintiff, and A. O. Bement, president of the defendant corporation, for the defendant.

The other license, called Exhibit B, was in substance the same as Exhibit A, excepting that the privilege of sale for the articles manufactured was that portion of the territory embraced within the United States lying south and west of Virginia, West Virginia, and Pennsylvania, and there was some difference in the machines which the defendant was authorized to manufacture and sell under this license, and in regard to the prices to be charged for those machines not covered by the former contract or license.

These two agreements were, as stated, made parts of the plaintiff's complaint, and the plaintiff then set forth various alleged violations of the two agreements on the part of the defendant, and claimed a recovery of a large amount of damages under the provisions of the contracts, and prayed for an

injunction restraining future violations, and for a specific performance of the contracts.

The plaintiff also alleged that the plaintiff's assignor, the New York corporation, duly assigned to the plaintiff all its rights and interests in regard to the subject-matter of the two contracts, and that the plaintiff, at the time of the commencement of the action, was the lawful owner of all such interests and rights, and was entitled to bring the action in its own name.

To this complaint the defendant made answer, denying many of its allegations and setting up certain other agreements which it alleged had been made by the plaintiff and other parties, including defendant, and which, as averred, amounted to a combination of all the manufacturers and dealers in patent harrows, to regulate their manufacture and to provide for their sale and the prices thereof throughout the United States. It was also in the answer averred that such contracts had been pronounced to be void by the supreme court of New York, and the contracts now before the court were, as contended by defendant, but a continuation and a part of the other contracts already declared void, and that these contracts between the parties to this action were also void. It is also alleged that all of the various contracts were in violation of the act of Congress approved July 2, 1890, being chapter 647 of the first session of the Fifty-first Congress (26 Stat. at L. 209), entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies."

The case was referred to a referee to hear and decide, who, after hearing the testimony, reported in favor of the plaintiff. The material portions of his report are as follows:

"That for some time prior to the month of September, 1890, the spring tooth harrow business was conducted by the following named parties: D. C. & H. C. Reed & Company, of Kalamazoo, Mich.; G. B. Olin & Company, Perry and Canandaigua, N. Y.; Chase, Taylor & Company, W. S. Lawrence, doing business under the name of Lawrence & Chapin, both of Kalamazoo, Mich.; J. M. Childs & Company, of Utica, N. Y.; and A. W. Stevens & Son, of Auburn, N. Y.,—who began the harrow business in substantially the order named above.

"The first two above-named firms conducted their business

in separate portions or territory of the United States, under the same United States letters patent, and the other firms began their business in hostility to the same letters patent. The first two firms began a number of patent lawsuits against the other firms and their customers for infringement of patents. These suits were vigorously prosecuted, and the court finally decided the patents valid, and ordered an accounting of profits against the firm of Chase, Taylor & Company, and W. S. Lawrence.

"Prior to September, 1890, the last four of the above-named firms settled their disputes over patents with the first two firms, and took licenses under their letters patent. Considerable sums of money were paid in settlement of these disputes and rights; and prior to said date, September, 1890, there was no other relation between the first two firms named and the other parties than that of licensor and licensee under United States letters patent.

"In the year 1890, and just prior thereto, other persons, firms, and corporations began the spring tooth harrow business, and other patent lawsuits followed. Suits were begun against the defendants herein, and against their customers purchasing their spring tooth harrows; and one case had gone to final decree, in which the defendant was ordered to account for profits and damages; and an injunction had been granted in another suit. Proceedings were pending upon an application for rehearing in these cases.

"In September, 1890, the six firms first above named decided to organize a corporation known as the National Harrow Company of New York, with a view to transferring various United States letters patent owned by the six firms respectively to said corporation, and for the purpose of conducting the manufacture of some part or portion of the material which entered into their spring tooth harrow business.

"In the conduct of the spring tooth harrow business, the harrows came to be known in the market as 'float spring tooth harrows;' that name having been adopted to differentiate the harrows from those known in the market as 'wheel harrows,' which had frame bars and curved spring teeth supported from an axle above, which axle had wheels at either end of the diameter above 30 inches. The two classes of harrows were differentiated, one being called a 'float' and the other a 'wheel'

spring tooth harrow. The litigations had been wholly over the 'float' spring tooth harrows.

"The members composing the first six firms above named in the harrow business in September, 1890, organized under the laws of the state of New York the 'National Harrow Company.' That corporation was duly legally incorporated, and after its incorporation it received from the said six firms the transfer of their separate United States letters patent, license contracts, and privileges under patents. The defendant's president, Arthur O. Bement, became and continued a director of this corporation until its dissolution, which followed in a little over a year.

"This corporation entered into some contracts with spring tooth harrow manufacturers, which were decided by the supreme court of the state of New York to be illegal as against public policy, on account of restraints contained in the contracts, which extended beyond the lifetime of the patents. That case is reported in the New York Supplement, vol. 18, page 224. *Strait v. National Harrow Co.*

"Immediately following this decision, all of the contracts then in existence which were affected thereby were immediately canceled by the parties to such contracts.

"The defendant, E. Bement & Sons, in the fall of 1890, entered into a contract with the National Harrow Company, looking to the selling of its patents and rights under patents relating to the spring tooth harrow business, but this contract was abandoned; the conditions upon which it was executed not having been complied with, the contract became and was wholly void.

"The defendant had no contract with the National Harrow Company until about June 16 or 17, 1891, at which time several contracts were entered into between the defendant and the National Harrow Company of New York. Among other contracts the defendant executed and delivered assignments in writing of several United States letters patent and license rights and privileges under United States letters patent, all of which related to the defendant's float spring tooth harrow business. Such contracts constituted an absolute sale of the property and privileges thereby transferred, and the defendant agreed to accept in payment thereof the paid-up capital

stock of the National Harrow Company of New York, and the value of the rights transferred were by agreement between the parties fixed and determined by arbitration, under which arbitration the defendant was awarded and the value was fixed at upwards of \$29,000. The defendant was dissatisfied with the amount of the award, and such dissatisfaction and difference was afterwards adjusted by an agreement to issue to the defendant and the defendant to accept an additional amount of \$16,000 of said capital stock. That by agreement, in the place of the said capital stock of the New York company, the defendant accepted and agreed to take the stock of the plaintiff in this action, and there has been issued to the defendant and the defendant has received the capital stock of this plaintiff in an amount upwards of \$45,000 in payment for the property and rights sold and transferred by the defendant to the National Harrow Company of New York. That said upwards of \$45,000 of stock was issued to the president of the defendant for defendant's benefit, and on said stock defendant has received several cash dividends.

"The transaction between the National Harrow Company of New York and this defendant, had in June, 1891, was intended by the parties to be an absolute sale by the defendant to the National Harrow Company of New York of the United States letters patent and licenses under United States letters patent relating to the float spring tooth harrow business conducted by the defendant, and it was founded on a good, valuable, and adequate consideration moving between the parties.

"That, as a part of such transaction, the National Harrow Company of New York granted, issued, and delivered to the defendant the license contracts A and B, which are attached to the complaint in this action and made a part thereof. Upon the consummation of the transaction in June, 1891, the controversy over patents and infringements existing between the first six firms named above and the defendant and its customers was settled. The papers which were executed in June, 1891, were all dated as of April 1, 1891, and were to take effect as of that date. At the date of the execution and delivery of the license contracts A and B the National Harrow Company of New York was the owner by assignment and purchase of a large number of United States letters patent,

which it is claimed fully monopolized and covered the defendant's float spring tooth harrow business.

"The sale by the defendant of its letters patent and license rights and privileges to the National Harrow Company of New York, and the signing and delivering of license contracts A and B, were intended to and did settle existing controversies with reference to the rights of the National Harrow Company of New York and the defendant.

"I decide that the contract entered into in June, 1891, including the contracts A and B between the National Harrow Company of New York and this defendant, were and are good and valid contracts, founded on adequate considerations, and were reasonable in their provisions; contracts A and B imposing no restraints upon the defendant beyond those which the parties had a right, from the nature of the transaction, to impose and accept.

"In July, 1891, a corporation was organized under the laws of the state of New Jersey, known and designated as the National Harrow Company, which corporation is the plaintiff in this action. None of the parties organizing this corporation were in the spring tooth harrow business. The New Jersey corporation was duly and legally organized in conformity with the laws of that state, and was by those laws and its charter authorized to purchase United States letters patent, and to grant licenses under United States letters patent, and to conduct the manufacturing business, and had a variety of other rights and privileges under its charter and said statutes. That this corporation, the plaintiff, still is a legal and valid corporation, entitled to hold and enjoy such of its property as it now or may hereafter own or acquire, and that it was not organized in hostility to any rule of public policy.

"That the National Harrow Company of New Jersey, this plaintiff, through its duly constituted officers purchased from the National Harrow Company of New York all of its various United States letters patent, and all contracts, licenses, and privileges which the National Harrow Company of New York then owned and possessed, and also purchased a part of its other property, rights, and privileges.

"That on the 9th of September, 1891, a formal transfer in writing was made from the National Harrow Company of New

York to the National Harrow Company of New Jersey of the property and rights sold as aforesaid by the former company to the latter, which transfer was founded on a good, valuable, and adequate consideration moving between the parties, and which transfer was sanctioned by the directors and stockholders of the New York corporation, and by the officers and directors of the National Harrow Company of New Jersey, this plaintiff, and separate assignments in writing were made of the various United States letters patent from the New York corporation to the New Jersey corporation.

"I decide that this transfer was in all respects legal and valid, being founded on a good and valuable consideration, and that it vested in the plaintiff in this action all the rights, privileges, and benefits accruing to the New York corporation under its contracts with the defendant, including contracts A and B, which contracts have been slightly modified by the parties as to price and terms of sale.

"The defendant's president, Arthur O. Bement, became a director and an active manager of the plaintiff, and continued as such down to September, 1893.

"The defendant made monthly verified reports to this plaintiff down to and including the 8th of September, 1893, of the harrows embraced in contracts A and B, by such reports stating the total harrows sold to be 13,900, on which defendant paid to the plaintiff a royalty of \$13,900.

"The National Harrow Company of New York and this plaintiff have performed all of the stipulations and provisions in the contracts entered into between the National Harrow Company of New York and this defendant, including all the provisions of contracts A and B; and the plaintiff is now ready, willing, and able to perform all of the stipulations and agreements to be performed on its part as assignee of the National Harrow Company of New York.

"That the defendant, after having received and retained large pecuniary benefits under the contracts, has failed, neglected, and refused, and still fails, neglects, and refuses, to keep and perform its contracts entered into, including the stipulations and provisions contained in contracts A and B, and since September, 1893, it has wholly repudiated contracts A and B, and refused to perform any of the stipulations contained

therein which it agreed to do and perform, and it has broken and violated all of the stipulations and agreements contained in contracts A and B which it agreed to do and perform."

The referee then states with some detail the various violations of the license agreements by the defendant, and finds the defendant indebted to the plaintiff in the sum of over \$20,000. He then continues as follows:

"I decide that the plaintiff is a legal and valid corporation authorized to enforce its rights in courts having jurisdiction; and that all of the contracts in evidence were and are legal, valid, and binding contracts, such as might reasonably be made under the circumstances, founded upon an adequate consideration, and that they embodied no illegal restraints, and are not repugnant to any rule of public policy as in restraint of trade or tending to create a monopoly, trust, or any other illegal combination; and that the contracts entered into between the defendant and the National Harrow Company of New York, including contracts A and B, are and were intended to be continuing contracts, and should be enforced according to their true intent and meaning as hereby interpreted."

The referee then held the plaintiff entitled to a judgment against the defendant, declaring the validity of the plaintiff corporation and its title to the contracts and their validity, and decreeing specific performance thereof and restraining future violations of the contracts by the defendant. Judgment in accordance with the report was entered, from which the defendant appealed to the appellate division of the supreme court.

Some difficulties regarding the form in which the case was presented to that court arose upon the argument, and it was therefore suspended and the case sent back to the referee for a resettlement, which was subsequently agreed upon by counsel for the respective parties, who entered into a stipulation in regard to what was to be reviewed by the courts above, and, among other things, it was agreed between counsel "that the foregoing record, as amended and corrected in this stipulation, contains all of the evidence given and proceedings had before the referee material to the questions to be raised on this appeal by the appellant, which questions to be raised by the appellant on this appeal are to be only as follows." Those questions are

eight in number, the fourth of which is: "Whether or not the contracts A and B are valid under the act of Congress approved July 2, 1890, chapter 647 of the first session of the Fifty-first Congress." This is the only Federal question raised and appearing in the record.

The case was thereupon argued before the appellate division, which reversed the judgment and ordered a new trial, but it did not state in its order of reversal that the judgment was reversed on questions of fact as well as of law. The plaintiff then appealed to the court of appeals from the order granting a new trial, and after argument it was held by that court that it had no jurisdiction to review the facts, and that upon the findings of the referee there had been no error of law committed, and consequently the supreme court was wrong in reversing the judgment. The court therefore reversed the judgment of the supreme court, and affirmed the judgment entered upon the report of the referee.

MR. JUSTICE PECKHAM, after making the foregoing statement of facts, delivered the opinion of the court:

In this court we are concluded by the findings of fact made in a state court in a suit in equity, as well as in an action at law. *Dower v. Richards*, 151 U. S. 658, 666, 38 L. ed. 305, 308; *Israel v. Arthur*, 152 U. S. 355, 38 L. ed. 474; *Egan v. Hart*, 165 U. S. 188, 41 L. ed. 680; *Hedrick v. Atchison, T. & S. F. R. Co.* 167 U. S. 673, 677, 42 L. ed. 320, 321.

The only Federal question raised in the record is as to the validity of contracts A and B, with regard to the act of Congress on the subject of trusts. 26 Stat. at L. 209, chap. 647. That is a question of law plainly raised in the record, and we are not precluded from its consideration by any action of the state courts. If, however, facts not found by the referee are necessary for the purpose of connecting those contracts with others not found in such report, we cannot supply the omission to find those facts. The contention of the defendant is that the two contracts A and B are in truth a part and continuation of the agreements set forth in the defendant's answer, and that, taken together, they prove a purpose and combination on the part of all the dealers in patented harrows to control their manufacture, sale, and price in all portions of the United

States; and defendant avers that such a contract or combination was and is void, not only as against public policy, but also because it is a violation of the Federal statute upon the subject of trusts and illegal combinations. Those former alleged contracts are not mentioned in the report of the referee excepting as, he stated, they had been declared void as against public policy and as being in restraint of trade because they extended beyond the life of the patents therein mentioned; and the referee found that following this decision all of the contracts then in existence, which were affected thereby, were immediately canceled by the parties thereto.

The referee made no finding of any fact connecting the contracts A and B with prior contracts of a like nature including other parties, as alleged in the answer of the defendant. The referee did find, however, that the defendant had no contract with the National Harrow Company until June 16 or 17, 1891, at which time several contracts were entered into between the defendant and the National Harrow Company of New York, and among other contracts the defendant executed and delivered assignments in writing of several United States letters patent and license rights and privileges under United States letters patent, all of which relate to the defendant's float spring tooth harrow business. He also found that such contracts constituted an absolute sale of the property and privileges thereby transferred, and that the defendant agreed to and did accept in payment thereof paid-up capital stock of the plaintiff. He further found that the transaction between the assignor of the plaintiff and the defendant in June, 1891, was intended by the parties to be an absolute sale by the defendant to such assignor of the United States letters patent and licenses under such patents relating to the float spring tooth harrow business conducted by the defendant, and that it was founded upon a good, valuable, and adequate consideration between the parties; that as a part of such consideration the assignor of the plaintiff granted and delivered to the defendant the license contracts A and B, heretofore spoken of, and that upon the consummation of the transaction the controversy over patents and infringements existing between the first six firms named in the referee's report and the defendant and its customers was settled. The report also decided "that the contract entered into in June,

1891, including the contracts A and B between the National Harrow Company of New York and this defendant, were and are good and valid contracts, founded on adequate considerations, and were reasonable in their provisions; contracts A and B imposing no restraints upon the defendant beyond those which the parties had a right, from the nature of the transaction, to impose and accept."

The omission of the referee to find from the evidence that the contracts A and B were a continuation of former contracts held to have been void, and that there were in fact other manufacturers of harrows who had entered into the same kind of contracts with plaintiff as those denominated A and B, and that there was a general combination among the dealers in patented harrows to regulate the sale and prices of such harrows, furnishes no ground for this court to assume such facts. The contracts A and B are to be judged by their own contents alone, and construed accordingly.

The referee also decided that the plaintiff was a legal and valid corporation, authorized to enforce its rights in courts having jurisdiction; and that all the contracts in evidence were and are legal, valid, and binding contracts, and such as might reasonably be made under the circumstances, and were founded upon a good, valuable, and adequate consideration, and were reasonable in their provisions, and that they embodied no illegal restraints, and were not repugnant to any rule of public policy as in restraint of trade, and were not intended to create a monopoly, trust, or illegal combination; and that the contracts entered into between the defendant and the National Harrow Company of New York, including the contracts A and B, are and were intended to be continuing contracts, and should be enforced according to their true intent and meaning as hereby interpreted.

When he speaks of all the contracts in evidence, the referee plainly means all the contracts in evidence between the parties to this action, for it was of such contracts only that he had been speaking. There were, in fact, other contracts than those designated A and B between these parties, and such other contracts had been put in evidence and previously referred to by the referee. He therefore must have included what is termed the escrow agreement in his finding that all the agreements

made by defendant with the plaintiff were valid. The agreement is set forth in the margin.²

There is no finding by the referee that this agreement was ever signed by anyone other than the parties to this action, or that any other person received the licenses from and made contracts with the plaintiff similar to the ones entered into between these parties. All that the referee finds is that all the contracts in evidence were legal, by which was meant, as already stated, all the contracts in evidence between the parties to the action, which were in existence and unanceled. In the absence of any finding as to the escrow agreement having been signed by others, it must be regarded as unimportant, and we are brought back to the question whether these contracts or licenses, A and B, irrespective of any contracts not found by the referee as in any way connected with or forming a part thereof, are void as a violation of the act of Congress.

The plaintiff contends in the first place that only the Attor-

2—*Escrow Agreement.* This memorandum of agreement, made and entered into this 1st day of April, A. D. 1891, by and between the National Harrow Company, a corporation of Utica, in the state of New York, and Edward Norris, of the same place, and E. Bement & Sons, of Lansing, in the state of Michigan.

Whereas, the said National Harrow Company is the owner of a large number of letters patent relating to float spring tooth harrows, and is desirous of granting licenses thereunder to the following-named persons, firms, and corporations, to wit: Chas. H. Childs & Company, D. B. Smith & Company, A. W. Stevens & Son, Childs & Jones, Syracuse Chilled Plow Company, Geo. W. Sweet & Company, Walker Manufacturing Company, Taylor & Henry, the Herndeen Manufacturing Company, D. C. & H. C. Reed & Company, L. C. Lull & Company, Williams Manufacturing Company, W.

S. Lawrence, McSherry Manufacturing Company, D. O. Everest & Company, E. Bement & Sons, Hench & Dromgold, Farmers' Friend Manufacturing Company, Eureka Mower Company.

And whereas, the said National Harrow Company has placed in the hands of said E. Norris in escrow, duly executed by it in duplicate, a certain contract and license for each of said persons, firms, and corporations hereinbefore named, to be by the said E. Norris immediately presented to each of the above and foregoing named respective persons, firms, and corporations, to be signed and executed by said respective persons, firms, and corporations—

Now, therefore, it is hereby understood and agreed by and between the parties hereto, that as the said licenses and contracts are signed and executed by the said respective persons, firms, and corporations they shall be held by said Norris in escrow for both parties until such

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ney General of the United States can bring an action under the statute, excepting that by § 7 of the act any person injured in his business or property, as provided for therein, may himself sue in any circuit court of the United States in the district in which the defendant resides or is found. Assuming that the plaintiff is right so far as regards any suit brought under that act, we are nevertheless of opinion that anyone sued upon a contract may set up as a defense that it is a violation of the act of Congress, and, if found to be so, that fact will constitute a good defense to the action.

The 1st section of the act provides that "every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal." Every person making such a contract is deemed guilty of a misdemeanor, and on conviction is to be punished by fine or by im-

time as all of said above-named persons, firms, and corporations shall have signed, executed, and delivered the same to said Norris, whereupon they shall become operative, and immediately thereafter the said Norris shall deliver one of the duplicates of each of said contracts and licenses to the said National Harrow Company, and the other duplicate thereof to the respective licensees who have signed the same, in person or by mail.

But in case any of the above-named persons, firms, and corporations shall neglect or refuse to sign, execute, and deliver said respective contracts and licenses on or before the 1st day of June next, then and in such case said E. Norris shall, provided he shall be so directed by a resolution duly adopted by the board of trustees of said National Harrow Company, make delivery of each of said contracts and licenses as have been signed and executed as above provided, at which time said contracts and licenses shall be-

come operative, and in case the said National Harrow Company shall conclude not to accept any less number than the whole of such respective contracts and licenses, then and in such case the said Norris shall cancel each of said contracts and licenses, and they shall be null and void.

Witness the signatures of the parties.

The National Harrow Co.,

By Chas. H. Childs, Pres't.

Edward Norris.

E. Bement & Sons,

By A. O. Bement, Pres't.

Received of E. Bement & Sons a license and contract executed between the National Harrow Company and said E. Bement & Sons, which I agree to hold and deliver in accordance with an agreement between the said National Harrow Company and said E. Bement & Sons and myself, and hereto attached.

Dated this 1st day of April, 1891.

Edward Norris.

prisonment, or both. As the statute makes the contract in itself illegal, no recovery can be had upon it when the defense of illegality is shown to the court. The act provides for the prevention of violations thereof, and makes it the duty of the several district attorneys, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations, and it gives to any person injured in his business or property the right to sue; but that does not prevent a private individual when sued upon a contract which is void as in violation of the act from setting it up as a defense, and we think when proved it is a valid defense to any claim made under a contract thus denounced as illegal.

This brings us to a consideration of the terms of the license contracts, for the purpose of determining whether they violate the act of Congress. The first important and most material fact in considering this question is that the agreements concern articles protected by letters patent of the government of the United States. The plaintiff, according to the finding of the referee, was at the time when these licenses were executed the absolute owner of the letters patent relating to the float spring tooth harrow business. It was therefore the owner of a monopoly recognized by the Constitution and by the statutes of Congress. An owner of a patent has the right to sell it or to keep it; to manufacture the article himself or to license others to manufacture it; to sell such article himself or to authorize others to sell it. As stated by Mr. Justice NELSON, in *Wilson v. Rousseau*, 4 How. 646, 674, 11 L. ed. 1141, 1153, in speaking of a patent:

“The law has thus impressed upon it all the qualities and characteristics of property for the specified period, and has enabled him to hold and deal with it the same as in case of any other description of property belonging to him, and on his death it passes, with the rest of his personal estate, to his legal representatives, and becomes part of the assets.”

Again, as stated by Mr. Chief Justice MARSHALL, in *Grant v. Raymond*, 6 Pet. 218, 241, 8 L. ed. 376, 384:

“To promote the progress of useful arts is the interest and policy of every enlightened government. It entered into the views of the framers of our Constitution, and the power ‘to promote the progress of science and useful arts, by securing

for limited times to authors and inventors the exclusive right to their respective writings and discoveries,' is among those expressly given to Congress. This subject was among the first which followed the organization of our government. It was taken up by the first Congress at its second session, and an act was passed authorizing a patent to be issued to the inventor of any useful art, etc., on his petition, 'granting to such petitioner, his heirs, administrators, or assigns, for any term not exceeding fourteen years, the sole and exclusive right and liberty of making, using, and vending to others to be used, the said invention or discovery.' The law further declares that the patent 'shall be good and available to the grantee or grantees by force of this act, to all and every intent and purpose herein contained.' The amendatory act of 1793 contains the same language, and it cannot be doubted that the settled purpose of the United States has ever been, and continues to be, to confer on the authors of useful inventions an exclusive right in their inventions for the time mentioned in their patent. It is the reward stipulated for the advantages derived by the public for the exertions of the individual, and is intended as a stimulus to those exertions. The laws which are passed to give effect to this purpose ought, we think, to be construed in the spirit in which they have been made, and to execute the contract fairly on the part of the United States, where the full benefit has been actually received, if this can be done without transcending the intention of the statute, or countenancing acts which are fraudulent or may prove mischievous. The public yields nothing which it has not agreed to yield; it receives all which it has contracted to receive. The full benefit of the discovery, after its enjoyment by the discoverer for fourteen years, is preserved; and for his exclusive enjoyment of it during that time the public faith is pledged."

In *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.* 35 L. R. A. 728, 732, 25 C. C. A. 267, 274, 47 U. S. App. 146, 160, it is stated regarding a patentee:

"If he see fit, he may reserve to himself the exclusive use of his invention or discovery. If he will neither use his device nor permit others to use it, he has but suppressed his own. That the grant is made upon the reasonable expectation that he will either put his invention to practical use or permit others

to avail themselves of it upon reasonable terms is doubtless true. This expectation is based alone upon the supposition that the patentee's interest will induce him to use, or let others use, his invention. The public has retained no other security to enforce such expectations. A suppression can endure but for the life of the patent, and the disclosure he has made will enable all to enjoy the fruit of his genius. His title is exclusive, and so clearly within the constitutional provisions in respect of private property that he is neither bound to use his discovery himself nor permit others to use it. The *dictum* found in *Hoe v. Knap*, 27 Fed. 204, is not supported by reason or authority.

It is true that in certain circumstances the sale of articles manufactured under letters patent may be prevented when the use of such article may be subject, within the several states, to the control which they may respectively impose in the legitimate exercise of their powers over their purely domestic affairs, whether of internal commerce or of police regulation. Thus an improvement for burning oil, protected by letters patent of the United States, was condemned by the state inspector of Kentucky as unsafe for illuminating purposes, under the statute requiring an inspection and imposing a penalty for the violation of the statute; and it was held that the enforcement of the statute was within the proper police powers of the state, and that it interfered with no right conferred by the letters patent. *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115.

There are decisions also in regard to telephone companies operating under licenses from patentees giving them the right to use their patents for the purpose of operating public telephone lines, but prohibiting companies from serving within such district any telephone company, and it has been held in the lower Federal courts that such a prohibition was of no force; that it was inconsistent with the grant, because a telephone company, being in the nature of a common carrier, was bound to render an equal service to all who applied and tendered the compensation fixed by law for the service; that while the patentees were under no obligation to license the use of their inventions by any public telephone company, yet, having done so, they were not at liberty to place restraints upon such a public corporation which would disable it to discharge all

the duties imposed upon companies engaged in the discharge of duties subject to regulation by law. It could not be a public telephone company, and could not exercise the franchise of a common carrier of messages, with such exception to the grant. See *State ex rel. Baltimore & O. Teleg. Co. v. Bell Teleph. Co.* 23 Fed. 539; *State ex rel. Postal Teleg. Cable Co. v. Delaware & A. Teleg. & Teleph. Co.* 47 Fed. 633, and *Delaware & A. Teleg. & Teleph. Co. v. State ex rel. Postal Teleg.-Cable Co.* 2 C. C. A. 1, 3 U. S. App. 30.

These cases are cited in the opinion of the court in the case of *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.* 35 L. R. A. 728, 25 C. C. A. 267, 47 U. S. App. 146. Notwithstanding these exceptions, the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal.

The contention that they do not affect interstate commerce is not correct. We think the licenses do by their terms and by their plain meaning refer to, include, and provide for interstate as well as other commerce. The contract called Exhibit B provides for the manufacture at Lansing, Michigan, and for the sale of the articles there made in territory lying south and west of Virginia and West Virginia and Pennsylvania, and the referee finds that a number of harrows have been sold under that contract. The contracts plainly look to the sale, and they also determine the price of the article sold, throughout the United States, as well as to the manufacture in the state of Michigan. As these contracts do, therefore, include interstate commerce within their provisions, we are brought back to the question whether the agreement between these parties with relation to these patented articles is valid within the act of Congress. It is true that it has been held by this court that the act included any restraint of commerce, whether reasonable or unreasonable. *United States v. Trans-Missouri Freight Asso.*

166 U. S. 290, 41 L. ed. 1007; *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136. But that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act, we have no doubt, was never contemplated by its framers.

United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, does not bear upon the facts herein. That case related to a purchase of stock in manufacturing companies, by reason of which the purchaser secured control of a large majority of the manufactories of refined sugar in the United States. It was held by this court that the Federal act relating to trusts and combinations affecting interstate commerce could not reach and suppress the creation of a monopoly in regard to the refining of sugar, and that the manufacturing of a commodity bore no direct relation to commerce between the states or with foreign nations. It was said by Mr. Chief Justice FULLER, for the court, while speaking of such manufacture: "Nevertheless, it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture, was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked."

In these contracts, provision is expressly made, not alone for manufacture, but for the sale of the manufactured product throughout the United States, and at prices which are particularly stated, and which the seller is not at liberty to decrease without the assent of the licensor. *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 238, 44 L. ed. 136, 143. These contracts directly affected, not as a mere incident of manufacture, the sale of the implements all over the country, and the question arising is whether the contracts which thus affect such sales are void under the act of Congress.

On looking through these licenses we have been unable to find any conditions contained therein rendering the agreement void because of a violation of that act. There had been, as

the referee finds, a large amount of litigation between the many parties claiming to own various patents covering these implements. Suits for infringements and for injunction had been frequent, and it was desirable to prevent them in the future. The execution of these contracts did in fact settle a large amount of litigation regarding the validity of many patents, as found by the referee. This was a legitimate and desirable result in itself. The provision in regard to the price at which the licensee would sell the article manufactured under the license was also an appropriate and reasonable condition. It tended to keep up the price of the implements manufactured and sold, but that was only recognizing the nature of the property dealt in, and providing for its value so far as possible. This the parties were legally entitled to do. The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it, or sell the right to manufacture and sell the article patented, upon the condition that the assignee shall charge a certain amount for such article.

It is also objected that the agreement of the defendant not to manufacture or sell any other float spring tooth harrow, etc., than those which it had made under its patents before assigning them to the plaintiff, or which it was licensed to manufacture and make, under the terms of the license, except such other style and construction as it may be licensed to manufacture and sell by the plaintiff, is void under the act of Congress.

The plain purpose of the provision was to prevent the defendant from infringing upon the rights of others under other patents, and it had no purpose to stifle competition in the harrow business more than the patent provided for, nor was its purpose to prevent the licensee from attempting to make any improvement in harrows. It was a reasonable prohibition for the defendant, who would thus be excluded from making such harrows as were made by others who were engaged in manufacturing and selling other machines under other patents. It would be unreasonable to so construe the provision as to prevent defendant from using any letters patent legally obtained by it and not infringing patents owned by others. This was neither its purpose nor its meaning.

There is nothing which violates the act in the agreement that

plaintiff would not license any other person than the defendant to manufacture or sell any harrow of the peculiar style and construction then used or sold by the defendant. It is a proper provision for the protection of the individual who is the licensee, and is nothing more in effect than an assignment or sale of the exclusive right to manufacture and vend the article. In brief, after a careful examination of these contracts, we are unable to find any provision in them, either taken separately or in connection with all the others therein contained, which would render the contracts between these parties void as in violation of the act of Congress.

It must, however, be conceded that the escrow agreement above set forth looks to the signing, by the parties mentioned therein, of contracts similar to those between the parties to this suit, designated A and B, and containing like conditions relating to the patents respectively owned by such parties. But there is no finding by the referee that such contracts were in fact entered into by those other parties, nor that they constituted a combination of most, if not all, of the persons or corporations engaged in the business concerning which the agreements between the parties to this suit were made. If such similar agreements had been made, and if, when executed, they would have formed an illegal combination within the act of Congress, we cannot presume for the purpose of reversing this judgment, in the absence of any finding to that effect, that they were made and became effective as an illegal combination. As between these parties, we hold that the agreements A and B actually entered into were not a violation of the act. We are not called upon to express an opinion upon a state of facts not found. Upon the facts found there is no error in *the judgment of the Court of Appeals, and it must therefore be affirmed.*

Mr. Justice HARLAN, Mr. Justice GRAY, and Mr. Justice WHITE did not hear the argument and took no part in the decision of this case.

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STANDARD SANITARY MFG. CO. v. UNITED STATES

(Supreme Court of United States, 1912. 226 U. S. 20.)

This case given *ante*, p. 1136.³

UNITED STATES v. WINSLOW

(Supreme Court of United States, 1913. 227 U. S. 202.)

MR. JUSTICE HOLMES delivered the opinion of the court:

This is a writ of error to determine whether two counts in an indictment, as construed by the district court, charge offenses under the Sherman act of July 2, 1890, chap. 647, 26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3200. They were held bad, on demurrer, by the district court. 195 Fed. 578. The two counts allege substantially the same facts; the first laying them as a combination in restraint of the trade of the defendants themselves, the second, as a conspiracy in restraint of the trade of others, shoe manufacturers.

The facts alleged are as follows: For the last twenty-five years practically all the shoes worn in the United States have been made by the help of machines, grouped as lasting machines, welt-sewing machines, and outsole-stitching machines, heeling machines and metallic fastening machines, there being a large variety of machines in each group. (These machines, of course, are not alleged to do all the work of making finished shoes.) There is a great number of shoe factories, and be-

3—Blount Mfg. Co. v. Yale & Towne Mfg. Co., 166 Fed. 555; "Combinations between owners of independent patents, whereby, as part of a plan to monopolize the commercial field, competition is eliminated, are within the Sherman act, for the reason that the restraint of trade or monopoly arises from combination, and not from the exercise of rights granted by letters patent. As by the terms of the contracts under consideration the owners of distinct patents each

agreed to restrain its own interstate trade, I am of the opinion that the contracts are in these particulars obnoxious to the Sherman anti-trust act." Per Brown, District Judge, p. 562. See also Vulcan Powder Co. v. Hercules Powder Co., 96 Cal. 510; State v. Creamery Package Mfg. Co., 110 Minn. 415; National Harrow Co. v. Bement & Sons, 21 N. Y. App. Div. 290.

But see Columbia Wire Co. v. Freeman Wire Co., 71 Fed. 302.

cause the machines are expensive and the best of them patented, the manufacturers have had to get them principally from the defendants. Before and up to February 7, 1899, the defendants Winslow, Hurd, and Brown, through the Consolidated and McKay Lasting Machine Company, under letters patent, made 60 per cent of all the lasting machines made in the United States; the defendants Barbour and Howe, through the Good-year Shoe Machinery Company, in like manner made 80 per cent of all the welt-sewing machines and outsole-stitching machines, and 10 per cent of all the lasting machines; and the defendant Storrow (against whom the indictment has been dismissed), through the McKay Shoe Manufacturing Company, made 70 per cent of all the heeling machines and 80 per cent of all the metallic fastening machines made in the United States. The defendants all were carrying on commerce among the states with such of the shoe manufacturers as are outside Massachusetts, the state where the defendants made their machines.

On February 7, 1899, the three groups of defendants above named, up to that time separate, organized the United Shoe Machinery Company, and turned over to that company the stocks and business of the several corporations that they respectively controlled. The new company now makes all the machines that had been made in different places, at a single new factory at Beverly, Massachusetts, and directly, or through subsidiary companies, carries on all the commerce among the states that had been carried on independently by the constituent companies before. The defendants have ceased to sell shoe machinery to the shoe manufacturers. Instead, they only let machines, and on the condition that unless the shoe manufacturers use only machines of the kinds mentioned, furnished by the defendants, or if they use any such machines furnished by other machinery makers, then all machines let by the defendants shall be taken away. This condition they constantly have enforced. The defendants are alleged to have done the acts recited with intent unreasonably to extend their monopolies, rights, and control over commerce among the states; to enhance the value of the same at the expense of the public; and to discourage others from inventing and manufacturing machines for the work done by those of the defendants. The

organization of the new company and the turning over of the stocks and business to it are alleged to constitute a breach of the Sherman act.

It is to be observed that the conditions now inserted in the leases are not alleged to have been contemporaneous with the combination, or to have been contemplated when it was made. The district court construed the indictment as confined to the combination of February 7; that is, simply to the merger of the companies, without regard to the leases subsequently made (195 Fed. 592, 594); and we have no jurisdiction to review this interpretation of the indictment. *United States v. Patten*, January 6, 1913 [226 U. S. 525, 57 L. ed. 333]. Hence the only question before us is whether that combination, taken by itself, was within the penalties of the Sherman act. The validity of the leases, or of a combination contemplating them, cannot be passed upon in this case.

Thus, limited, the question does not require lengthy discussion, and a large part of the argument addressed to us concerned matters not open here. On the face of it the combination was simply an effort after greater efficiency. The business of the several groups that combined, as it existed before the combination, is assumed to have been legal. The machines are patented, making them is a monopoly in any case, the exclusion of competitors from the use of them is of the very essence of the right conferred by the patents, *Paper Bag Patent Case* (*Continental Paper Bag Co. v. Eastern Paper Bag Co.*) 210 U. S. 405, 429, 52 L. ed. 1122, 1132, and it may be assumed that the success of the several groups was due to their patents having been the best. As, by the interpretation of the indictment below (195 Fed. 591) and by the admission in argument before us, they did not compete with one another, it is hard to see why the collective business should be any worse than its component parts. It is said that from 70 to 80 per cent of all the shoe machinery business was put into a single hand. This is inaccurate, since the machines in question are not alleged to be types of all the machines used in making shoes, and since the defendants' share in commerce among the states does not appear. But taking it as true, we can see no greater objection to one corporation manufacturing 70 per cent of three non-competing groups of patented machines collectively used for

making a single product than to three corporations making the same proportion of one group each. The disintegration aimed at by the statute does not extend to reducing all manufacture to isolated units of the lowest degree. It is as lawful for one corporation to make every part of a steam engine, and to put the machine together, as it would be for one to make the boilers and another to make the wheels. Until the one intent is nearer accomplishment than it is by such a juxtaposition alone, no intent could raise the conduct to the dignity of an attempt. See *Virtue v. Creamery Package Mfg. Co.* Jan. 20, 1913 [227 U. S. 8, 57 L. ed. 393]; *Swift & Co. v. United States*, 196 U. S. 375, 396, 49 L. ed. 518, 524.

It was urged as an afterthought that the act of March 2, 1907, chap. 2564, 34 Stat. at L. 1246, under which the United States took this writ of error, was repealed by the Judicial Code of March 3, 1911, chap. 231, 36 Stat. at L. 1087, 1168, U. S. Comp. Stat. Supp. 1911, pp. 128, 244. But it is not mentioned among the statutes expressly repealed by § 297 of the latter act, it is not superseded by any other regulations of the matter, it is a special provision, and on principles similar to those discussed in *Ex parte United States*, Jan. 6, 1913 [226 U. S. 420, 57 L. ed. —], it must be held not to have been repealed. See further, *Johnson v. United States*, 225 U. S. 405, 419, 56 L. ed. 1142, 1147; *Petri v. F. E. Creelman Lumber Co.* 199 U. S. 487, 497, 50 L. ed. 281, 286.

Judgment affirmed.

STRAUS v. AMERICAN PUBLISHERS' ASS'N

(Supreme Court of United States, 1913. 231 U. S. 222.)

MR. JUSTICE DAY delivered the opinion of the court:

This is a writ of error to review a judgment of the supreme court of the state of New York, rendered on remittitur from the court of appeals, refusing to grant to the plaintiffs in error an injunction restraining any interference with their purchase and sale of copyrighted books, and damages, the defendants acting under an agreement alleged to be violative of the laws of New York and the Sherman anti-trust act (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200).

The suit originated in a bill filed in the supreme court of the state of New York for New York county, in which the plaintiffs in error alleged that they conducted a department store in New York city, a large department of which was devoted to books, magazines, and pamphlets; that, because of their methods of business, they had been able to undersell other retail book stores; that the defendants in error, through the American Publishers' Association and the American Booksellers' Association, and by means of resolutions and agreements, with the co-operation of the Associations and their members, and by the use of various practices and methods, to the end that books should be sold to the booksellers only who would maintain the retail price upon net copyrighted books for one year, and who would not sell books to anyone who would cut such prices, had restrained and prevented competition in the state of New York and throughout all of the United States in the supply and price of books, and that the business of the plaintiffs in error had been seriously affected; and they prayed that the combination and agreements be declared unlawful, and that defendants be enjoined from acting thereunder or accomplishing the purposes thereof, and for damages. A demurrer having been interposed to the complaint and sustained by the court at special term, and the interlocutory judgment there entered having been reversed upon appeal to the appellate division of the first department, the court of appeals, permission having been granted to appeal and the question certified, affirmed the decision, and held that, so far as the bill related to copyrighted books, the demurrer was good; but that as to uncopyrighted books, the complaint stated facts sufficient to constitute a cause of action. 177 N. Y. 473, 64 L. R. A. 701, 101 Am. St. Rep. 819.

Amended answers having been filed, upon trial to the court without a jury, the court made findings of fact from which it appears that the material allegations of the complaint are true, as above set forth, and further, that about April 1, 1904, and after the decision of the court of appeals reported in 177 N. Y., the Associations amended their resolutions and agreements so as to restrict the application and operation thereof to copyrighted books only; that about January 19, 1907, the Publishers' Association revoked all its former resolutions and

adopted a new resolution, but that the Associations had continued the same course as to copyrighted books as was followed before the passage of such resolution. The court concluded that the resolutions and agreements, so far as they related to uncopyrighted books, were unlawful and contrary to the laws of New York, and to that extent granted relief by way of injunction and damages; but held that as to copyrighted books, the agreements, resolutions, and acts of the defendants were not unlawful, and entered an interlocutory judgment accordingly; and in its opinion the court stated that the former decision of the court of appeals in the case (177 N. Y. 473) was controlling. Plaintiffs in error excepted to the conclusions of law made by the court, restricting the illegality of the combinations to uncopyrighted books, and requested that certain conclusions be made, and excepted to the refusal to find the conclusions submitted by them.

From that part of the interlocutory judgment denying relief as to copyrighted books, the plaintiffs in error appealed to the appellate division, which, also upon the authority of 177 N. Y. 473, affirmed the interlocutory judgment, and judgment of affirmance was entered in the supreme court; and, with permission, an appeal was taken to the court of appeals, which answered in the negative the question certified by the appellate division as to whether plaintiffs in error, in so far as copyrighted books were concerned, were entitled to relief, adhering to its previous decision (177 N. Y. 473). 193 N. Y. 496. Judgment was so entered on remittitur to the supreme court. The report of the referee appointed to ascertain the amount of the damages sustained by the plaintiffs in error in the sale of uncopyrighted books having been filed and approved, final judgment was entered in the supreme court, granting an injunction and damages as to uncopyrighted books only, and upon appeal to the court of appeals that court affirmed the final judgment (199 N. Y. 548) and remitted the case to the supreme court. Judgment on remittitur was accordingly entered, and this writ of error sued out to review that judgment.

In this court a motion was made to dismiss the writ of error upon the ground that it presents no Federal question so saved and brought here as to permit a review of such question. When the case was before the court of appeals, upon demurrer to

the complaint (177 N. Y. 473), that court held that the agreement, as to copyrighted books, was not illegal, because of the monopoly granted to the holder of a copyright under the statutes of the United States. The court held that the agreement, as to uncopyrighted books, however, was in violation of the so-called anti-trust law of New York, chapter 690, Laws of 1899, making contracts, agreements, etc., creating monopoly, or restraining or preventing competition in the supply or price of articles or commodities void as against public policy. Subsequently the agreement was modified so as to apply to copyrighted books only, and findings of fact were specifically made upon which the case again went to the court of appeals of New York upon the certified question: "Are the plaintiffs, under the findings of fact contained in the decision in this case, entitled, in so far as copyrighted books are concerned, to the relief demanded in the complaint, or to any relief as against the defendants in this case?" Upon the record the court of appeals by a majority adhered to its former decision, notwithstanding the decision of *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 52 L. ed. 1086, which had in the meantime been decided by this court, and held that, as the object of the copyright and patent statutes was to give monopolies, contracts made by the owners of copyrights to secure the fullest protection in the enjoyment of their monopolies would not be condemned by the courts as being in unlawful restraint of trade; at least, not until the Supreme Court of the United States had pronounced differently (193 N. Y. 496). Three of the justices dissented upon the ground that the agreement was clearly one in restraint of trade, as they had theretofore held, and that the decision of this court in *Bobbs-Merrill Co. v. Straus*, *supra*, had so construed the copyright act as to limit the right of a copyright holder to the sale of copyrighted works, and did not have the effect to protect such monopolistic agreements as were shown in the present case. As to uncopyrighted books, the views theretofore expressed were maintained by the court, and upon remittitur judgment was entered granting injunction and damages as to such books.

An inspection of the record shows that before the case went to the court of appeals for decision the second time upon the facts found in the lower court, the following conclusions of

law were specifically requested, covering the effect of the Sherman anti-trust act as to copyrighted books dealt with in interstate commerce, as was found to be established by the facts in the present case:

“VII. That such resolutions and agreements purporting to restrict the effect of the combination, arrangement, or contracts to copyrighted books likewise affect an article of interstate commerce, and was unlawful and contrary to the aforementioned statute [the Sherman anti-trust act] of the United States as being in restraint of interstate commerce and tending to create a monopoly.”

“IX. That the owners of several separate copyrights are not empowered to enter into any contract or agreement or combination between themselves concerning the supply and price of books published under their separate copyrights which would be unlawful and contrary to the statutes of the United States against combinations in restraint of trade or for the purpose of creating a monopoly, if entered into with reference to the supply or price of uncopyrighted books.”

It is thus apparent that, when the defendants below set up the copyright statute of the United States as an authority for the agreement of the character here in question, the plaintiffs contended that such agreement was not only beyond the authority conferred in the copyright act, but was in violation of the terms of the Sherman anti-trust law, making illegal combinations in restraint of trade and tending to monopoly. This contention was in terms denied by the lower court, and the decision upon the facts found went to the court of appeals with the result which we have stated. The contention thus made as to the effect of the Sherman anti-trust act when read in connection with the copyright act of the United States presented a question of a Federal character to the state courts, which claim of Federal right was necessarily denied in the decision of the court of appeals, affirming the judgment of the court below. One who sets up a Federal statute as giving immunity from a judgment against him, which claim is denied by the decision of a state court, may bring the case here for review under § 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575), now § 237 of the Judicial Code [36 Stat. at L. 1156, chap. 231, U. S. Comp. Stat. Supp. 1911, p. 227]. *Nutt v.*

Knut, 200 U. S. 12, 50 L. ed. 348; *St. Louis, I. M. R. Co. v. Taylor*, 210 U. S. 281, 52 L. ed. 1061, 21 Am. Neg. Rep. 464; *St. Louis, I. M. & S. R. Co. v. McWhirter*, 229 U. S. 265, 57 L. ed. 1179. The motion to dismiss for want of jurisdiction must therefore be overruled.

This court, in the case of *Bobbs-Merrill Co. v. Straus*, *supra*, held that the copyright act did not grant the right to fix a limitation upon prices of books at subsequent sales to purchasers from retailers by notice of price limitation inscribed upon the book, and, construing the copyright act, held that, in conferring the right to vend a book, it did not intend to confer upon the holder of the copyright any further right after he had exercised the right to vend secured to him by the act.

In the case of *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 57 L. ed. 107, this court had under consideration the effect of the patent statute upon agreements found to be unlawful under the Sherman law, and the agreements condemned were held not to be protected as within the patent monopoly conferred by the statute. Replying to the contention as to the protection which the patent law gave to enter into such agreements, this court said (p. 49):

“Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights an universal license against positive prohibitions. The Sherman law is a limitation of rights,—rights which may be pushed to evil consequences, and therefore restrained.”

So, in the present case, it cannot be successfully contended that the monopoly of a copyright is in this respect any more extensive than that secured under the patent law. No more than the patent statute was the copyright act intended to authorize agreements in unlawful restraint of trade and tending to monopoly, in violation of the specific terms of the Sherman law, which is broadly designed to reach all combinations in unlawful restraint of trade, and tending, because of the agreements or combinations entered into, to build up and perpetuate monopolies.

From the finding of facts upon which the court certified the question decided to the court of appeals, after the attempted reformation in view of the first decision of that court, it appears that the Publishers' Association was composed of prob-

ably 75 per cent of the publishers of copyrighted and uncopyrighted books in the United States, and that the Booksellers' Association included a majority of the booksellers throughout the United States; that the Associations adopted resolutions and made agreements obligating their members to sell copyrighted books only to those who would maintain the retail price of such net copyrighted books, and, to that end, that the Associations combined and co-operated with the effect that competition in such books at retail was almost completely destroyed. The findings further show that the Associations employed various methods of ascertaining whether prices of net copyrighted books were cut and whether there was competition in the sale thereof at retail, and issued cut-off lists, so-called, directing the discontinuance of the sale of such books to offenders, and that the plaintiffs in error, who had failed to maintain net prices upon copyrighted books, had been put upon the cut-off lists, and were unable to secure a supply of such books in the ordinary course of business. It further appears that in some instances dealers who had supplied the plaintiffs in error were wholly ruined and driven out of business; that the Booksellers' Association widely circulated the names of such dealers, and warned others to avoid their fate, and that various circulars were issued to the trade at large by both Associations, warning all persons against dealing with the plaintiffs in error or other so-called price-cutters; that after the reformation of the resolutions and agreements in 1904, the Associations and their members continued the same methods as to ascertaining the supply of copyrighted books of the plaintiffs in error, as to cut-off lists and circulars to the trade, and that, although in 1907 the resolution of the Publishers' Association was modified so that the "agreement" became a "recommendation," the cut-off lists were still issued, with plaintiff's name thereon, and that the dealers still refused to supply plaintiffs in error with books of any kind. And it also appears from the finding of facts that the members of the Associations resided in and carried on the business of selling books in many different states, and purchased books from persons in many states other than the one in which they resided and did business; and that the rules, regulations, and agreements of the Associations were enforced against all publishers and dealers

in books throughout the United States, whether they were members of either Association or not, and whether they purchased books in one state for transportation and delivery in another, or for delivery in the state where purchased.

We agree with the court of appeals in its characterization of the agreement involved in this case, about which there seems to have been no difference of opinion, except as to the supposed protection of the copyright act. It manifestly went beyond any fair and legal agreement to protect prices and trade as among the parties thereto, and prevented, as the court of appeals said, when dealing with uncopyrighted books, the sale of books of any kind, at any price, to those who were condemned by the terms of the agreement, and with whom dealings were practically prohibited. We conclude, therefore, that the court of appeals erred in holding that the agreement was justified by the copyright act, and was not within the denunciation of the Sherman act, and in denying, for that reason alone, the right of the plaintiffs in error to recover under the state act as to copyrighted books.

This view of the case renders it unnecessary to decide whether an original action can be maintained in the state courts, seeking an injunction, and to recover damages under the Sherman law.

As the Federal question, made in the manner which we have stated, was, in our view, wrongly decided, and such decision was the basis of the judgment in the state court, the judgment of that court must be reversed. *Murdoek v. Memphis*, 20 Wall. 590, 634, 22 L. ed. 429, 443.

Judgment reversed and case remanded to the state court whence it came for further proceedings not inconsistent with this opinion.

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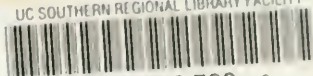
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